

(26,479)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 102.

THE CUYAHOGA RIVER POWER COMPANY, APPELLANT,

vs.

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY
AND THE NORTHERN OHIO POWER COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF OHIO.

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1 District Court of the United States, Northern District of Ohio,
Eastern Division.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,

against

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY and THE
NORTHERN OHIO POWER COMPANY, Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United
States for the Northern District of Ohio, Eastern Division, in
Equity Sitting:

The above-named plaintiff, a corporation duly organized and exist-
ing under the laws of the State of Ohio and a citizen of said State
and an inhabitant of the Northern District of Ohio, brings this its
bill of complaint in equity against the above-named defendants, each
of which is a corporation organized and existing under the laws of
the State of Ohio and a citizen of said State having its principal office
in and being an inhabitant of the Northern District of Ohio;
2 and said plaintiff thereupon shows unto the Court and, upon
information and belief, alleges:

First. The names, citizenship and residences of the parties to this
bill are as set forth in the introduction to this bill; and this suit arises
under the Constitution and laws of the United States, and the matter
in controversy herein exceeds, exclusive of interest and costs, the
sum or value of \$3,000; and the jurisdiction of this Court in this
cause depends upon the fact that this suit is a controversy of a civil
nature that arises under the Constitution and laws of the United
States.

Second. The plaintiff is an existing hydro-electric power company
duly incorporated under the laws of the State of Ohio on May 29,
1908, for the purpose specified in an act of the Legislature of that
State passed in the year 1904 and now contained in Sections 10,128
to 10,134 of the Ohio General Code of 1910.

The articles of incorporation of the plaintiff, filed with the Secre-
tary of State on May 29, 1908, specify that the stream across which
the dams to be built and maintained by it should be the Big Cuya-
hoga River, and that the improvement to be constructed by said com-
pany should begin at the confluence of the Big Cuyahoga River and
the Little Cuyahoga River below the City of Akron, Summit County,
Ohio, and extend along said Big Cuyahoga River through the County
of Summit to a point where said Big Cuyahoga River crosses the line
between Summit and Portage Counties.

Third. By said incorporation a contract was duly made and entered into between the State of Ohio and the plaintiff wherein
3 and whereby said State duly granted to the plaintiff a right of way over and along said Cuyahoga River between the above-mentioned termini and a vested right and franchise to construct, maintain, and operate, within the limits of said right of way, a hydro-electric plant for the development of electrical current and energy from the waters of said river, together with the right or franchise of exercising the State's power of eminent domain in order to appropriate and acquire all property necessary to carry out and perform said grant and make the same effective. Said grant never has been repealed by the State and is still in full force and effect.

Fourth. The right of way and franchises aforesaid were duly accepted by the plaintiff on and prior to June 4, 1908, and were and are of great value; and upon the faith thereof the capital stock of the plaintiff was subscribed and paid for and the plaintiff made large expenditures and investments and incurred large obligations, including notes and bonds of the par value of \$150,000, and stock of the par value of \$210,000. Said subscriptions, expenditures and investments were made and said obligations were incurred in large part prior to December, 1910.

Fifth. On June 4, 1908, the plaintiff, by its duly elected Board of Directors, adopted a specific and detailed plan for the development of hydro-electric power from the waters of the Cuyahoga River and the sale of the same to the public, and definitely located its proposed improvement for that purpose upon specifically described parcels
4 of land previously entered upon and surveyed by its engineers; and it then and there determined, declared, and resolved that said parcels of land were necessary and essential in order to carry out the purpose of its organization, and that the plaintiff thereby appropriated and condemned for its corporate purpose all the real property set forth and described in said resolution. A copy of said resolution is hereto annexed marked Exhibit A and hereby made a part of this bill. The parcels of land described in said resolution include all the parcels necessary to be acquired in order to construct and maintain the improvement specified in the plaintiff's said charter and resolution; and the location of said improvement so fixed by said resolution was permanent and irrevocable and conclusive upon the plaintiff and all other persons except as the same might be altered or amended by further act of the State.

Sixth. The forty-acre parcel of land mentioned in said resolution, Exhibit A, as being property then owned by Henry A. Everett and The Northern Ohio Traction & Light Company, (hereinafter called the Everett Parcel) consists of the bed and banks of the Cuyahoga River for a distance of about a mile and a half at the lower end of the plaintiff's said right of way and is an undivided portion of several larger tracts, aggregating about 170 acres, that were conveyed to said Everett by the Executors of one Jeremiah Milbank by deed dated December 14, 1897, and duly recorded in Summit County,

Ohio. Said deed is absolute in form and conveys a fee simple title; but certain persons connected with or interested in said Northern Ohio Traction & Light Company were asserting and claiming at the time of the adoption of said resolution that said Traction Company had some interest in said land by virtue of some agreement with said Everett.

The three-tenths of an acre parcel mentioned in said resolution as property then owned by The Akron, Bedford, and Cleveland Railroad Company and The Northern Ohio Traction & Light Company (hereinafter called the A. B. & C. Parcel) is likewise a part of the bed and banks of the Cuyahoga River at the lower end of the plaintiff's said right of way. It is a part of certain lands once owned by the Akron, Bedford & Cleveland Railroad Company and included in a deed from The Northern Ohio Traction Company to The Northern Ohio Traction and Light Company dated December 29, 1902.

The lands mentioned in said resolution as property then owned by Fannie V. Sackett (hereinafter collectively called the Sackett Parcel) are likewise a part of the bed and banks of the Cuyahoga River at the lower end of the plaintiff's said right of way, and were in fact then owned by said Fannie V. Sackett in fee simple.

Said Everett parcel and said A B & C parcel and said Sackett parcel are situated down-stream from the dams proposed to be erected by the plaintiff and are so situated that the improvement provided for in the plaintiff's charter and resolution cannot be constructed without a taking thereof by the plaintiff.

No part of either of said parcels is situated within the limits of any municipality.

Sixth. On June 5, 1908, the plaintiff duly instituted in the Probate Court of Summit County, Ohio, a court of competent jurisdiction in that behalf, a suit to condemn or appropriate, in accordance with the statutes of Ohio, the parcels of land mentioned and described in said resolution, Exhibit A, and procured the summonses in said suit to be served upon the defendants therein, including said Akron, Bedford and Cleveland Railroad Company, said Fannie V. Sackett, said Henry A. Everett, who was alleged to be the owner of said Everett parcel, and said Northern Ohio Traction & Light Company, one of the defendants herein, which was made a party as a person owning or claiming to own some interest in the property sought to be condemned.

Said appropriation suit was continuously pending until a date subsequent to July 18, 1911; but at the special instance and request of said Everett and said Northern Ohio Traction & Light Company (hereinafter called Traction Company), it was not pressed for trial as against them until January, 1911, up to which date the plaintiff and said Everett and said Traction Company were carrying on negotiations with respect to the plaintiff's acquisition of said Everett parcel by contract, which negotiations involved, also, various propositions as to the making of long term contracts under which the plaintiff would construct its proposed improvement in accordance with the plan adopted by it and furnish to said Traction Company a portion

of the power to be developed by the plaintiff. Said negotiations were prolonged and difficult and were finally terminated by the refusal of said Everett and said Traction Company to sell the land to the plaintiff.

Eighth. On or about the 20th day of December, 1910, while said appropriation suit was pending undetermined and before the termination of the negotiations aforesaid, said Henry A. Everett executed and delivered a deed to The Northern Realty Company (a corporation incorporated under the laws of Ohio in November, 1909, for the sole purpose of buying, selling, exchanging and generally dealing in real properties, and maintaining a general real estate agency), whereby he conveyed to said Realty Company the several tracts of land that had been conveyed to him by said Milbank's Executors. Said deed conveys to said Realty Company an absolute fee simple title to the land therein described, and provides:

"To have and to hold the premises aforesaid, with the appurtenances thereunto belonging, to the said grantee, its successors and assigns, so that neither the said grantor nor his heirs, nor any other persons claiming title through or under him, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred."

Said deed was received for record in the office of the County Recorder of Summit County, Ohio, on December 22, 1910, and was actually recorded therein on January 10, 1911.

Ninth. On January 20, 1911, after unsuccessful negotiations with said Realty Company for the purchase of said land, the plaintiff duly instituted in said Probate Court another suit to condemn or appropriate said Everett parcel and said A, B and C parcel, in which suit the sole defendant was said Realty Company. The summons therein was duly served, and since the date last mentioned said suit has been vigorously and diligently prosecuted and has been continuously pending, either in said Probate Court or upon a petition in error, and is now pending in the Supreme Court of the United States undetermined. Said suit was carried to said Supreme Court by means of a writ of error from that court to the Court of Appeals of the State of Ohio, Eighth District, which writ was allowed by one of the Justices of said Supreme Court.

Tenth. On January 31, 1911, after the summons in said last-named suit had been served and while said suit was still pending and undetermined, said Realty Company conveyed to the defendant The Northern Ohio Power Company a portion of the land conveyed by said Everett to said Realty Company as above set forth.

On July 18, 1911, said Northern Ohio Power Company purchased from said Fannie V. Sackett and said Fannie V. Sackett conveyed to said Northern Ohio Power Company the whole or a portion of said Sackett parcel hereinabove mentioned.

On February 24, 1914, while said appropriation suit was still

pending undetermined, said Northern Ohio Power Company sold and conveyed all its property, rights, and franchises, including said Everett and Sackett parcels, to the defendant Traction Company, and said last-named defendant thereupon entered upon and took
9 and now holds possession of said land and of the improvements thereon erected.

Said last-mentioned sale and conveyance was made under color of and pursuant to an authority claimed to be contained in an order made by the Public Utilities Commission of Ohio, which order is dated February 19, 1914, and was made upon a joint petition presented to said Commission by said Traction Company and said Northern Ohio Power Company. A copy of said petition and a copy of said order are hereto annexed, marked Exhibits B and C respectively, and hereby made a part of this bill.

Eleventh. Neither the deed mentioned in Paragraph Eighth hereof, nor the deed from Milbank's Executors to Henry A. Everett hereinabove mentioned, specifically described said Everett parcel or separated or set apart said parcel from the larger tracts mentioned in said deeds within the boundaries of which said parcel is included; and neither the defendants herein nor any other person or corporation had, at any time prior to January 20, 1911, made upon said Everett parcel or said Sackett parcel or said A, B & C parcel any location of any proposed improvement or structure for utilizing said parcels in the development of power, or obtained any grant therefor from the State of Ohio; and at all times prior to January 31, 1911, said Sackett parcel and said A, B & C parcel and said Everett parcel were each and all vacant and unimproved and were actually employed in no use and for no purpose whatsoever, except that
10 upon one of the tracts within the boundaries of which said Everett parcel is included there was a small inexpensive wooden structure intended and occasionally used for dancing and rolling skating, a small portion of which structure was within the boundaries of said Everett parcel.

Twelfth. Subsequent to January 20, 1911, and between January 31, 1911, and February 24, 1914, there was erected upon a portion of the lands conveyed by Milbank's Executors to Everett, and upon other lands adjacent thereto, including said Sackett parcel and said A, B & C parcel, a powerhouse with boilers, condensers, engines, tanks and other appliances for the generation of electric current and energy by means of steam power produced by the use of coal as a fuel, and also a dam, power-house, and other appliances for the generation of electrical current and energy by means of water power produced by the flow and fall of the waters of the Cuyahoga River over and along said Everett, Sackett, and A, B & C parcels. These structures are hereinafter designated as the "steam power plant" and as the "hydro-electric plant," respectively. Said dam is located wholly within the boundaries of said Everett parcel and the remainder of said hydro-electric plant is within the boundaries of said Sackett parcel and is inseparably connected therewith and uses the same and the waters of said river appurtenant thereto. A por-

tion of the foundations of said steam power-house are within the boundaries of said Everett parcel, and said steam power-house is also connected with the Cuyahoga River by means of pipes that are laid underground from the power-house across the Everett parcel

- 11 to the river, through which pipes the water of the river is pumped to the boilers of the steam power-house for use in the generation of steam.

The buildings of said steam power plant occupy a space 150 by 330 feet. In connection therewith there are coal bins having a capacity of upwards of 7,000 tons of coal.

Said steam power plant has a normal capacity of 31,000 horse power and a maximum capacity of about 83,000 horse power. Said hydro-electric plant has a capacity of 2,750 horse power during a period of about seven months during each year and is incapable of operation during the remainder of each year, owing to the fact that sufficient storage reservoirs have not been and can not be provided at that point of the river alone without the utilization of other parcels within the right of way of the plaintiff.

Thirteenth. Long prior to the defendant Traction Company's said purchase of the property, rights and franchises of the defendant Northern Ohio Power Company and prior to the execution of the deeds from said Realty Company and said Fannie V. Sackett to said Northern Ohio Power Company and of said deed from said Everett to said Realty Company, respectively, said Traction Company and said Northern Ohio Power Company and said Realty Company, each and all, had notice and actual knowledge of the State's grant to the plaintiff of the right of way mentioned in Paragraph Third hereof and of the plaintiff's locations hereinabove mentioned and of its plans and proposed plant and, also, of the plaintiff's selection of, location upon, and determination to acquire

- 12 said Everett, Sackett and A, B and C parcels, and of the necessity of said three parcels to the plaintiff in the construction and operation of its proposed plant.

Such notice and actual knowledge was conveyed to and acquired by the defendant Traction Company as early as June 5, 1908, and has been possessed by the defendant Power Company from the time of its incorporation; and all the acts performed by said companies with respect to said three parcels since June 5, 1908, have been performed with notice and knowledge of all said rights and franchises of the plaintiff, and have been performed wrongfully and in bad faith with the knowledge that such acts would embarrass, hinder, and delay the plaintiff and interfere with its exercise of its rights, and with the intent that such acts should have that effect.

Fourteenth. The defendant Northern Ohio Power Company claims and purports to be an existing corporation incorporated under the laws of Ohio on January 31, 1911, for the purpose specified in Sections 10,128 to 10,134 of the Ohio General Code of 1910, by the filing of articles of incorporation with the Secretary of State of Ohio. Said articles, so filed on or about January 31, 1911, specify the Cuyahoga River as the stream across which it would erect a

dam and further state that the proposed improvement to be erected by said company would have its termini in the Counties of Cuyahoga and Tuscarawas and that its main line and branches would pass in and through the Counties of Cuyahoga, Summit, Medina, Portage, Stark and Tuscarawas, in the State of Ohio.

Said defendant is not and never was engaged in any business except that it constructed the power plants mentioned in Paragraph Twelfth hereof, and conveyed the same to the defendant Traction Company immediately upon their completion; and, as above set forth, it has conveyed all its rights, property and franchises to said Traction Company.

The plaintiff charges and alleges that, insofar as the location of the proposed improvements specified in the articles of incorporation of said Northern Ohio Power Company conflicts with the location of the plaintiff's improvement as specified and set forth in the plaintiff's articles of incorporation, such articles of incorporation of the Northern Ohio Power Company are absolutely null and void because of such conflict; and by reason thereof said Northern Ohio Power Company never obtained any valid grant from the State of any right or franchise to use said Everett, Sackett and A, B & C parcels, or any of them, or the waters of the Cuyahoga River appurtenant thereto, for the development of hydro-electric power or any other public use, and hence could not have sold or conveyed any such right or franchise to the defendant Traction Company.

The defendant Traction Company is an interurban and street railway company incorporated under the laws of the State of Ohio by the filing of articles of incorporation on or about the 24th day of November, 1902. The purpose of said company as stated in its articles of incorporation is as follows:

14 "Said corporation is formed for the purpose of purchasing, acquiring, building, extending, leasing, equipping, owning, operating and maintaining street railroads, using other than animal power as a motive power for the transportation of passengers, packages, express matter, United States mail, baggage and freight, in the streets, avenues, public-ways and places in the City of Akron, Summit County, Ohio, in the Village of Barberton in said Summit County, Ohio, in the Village of Cuyahoga Falls, in said Summit County, Ohio, in the Village of Doylestown in Wayne County, Ohio, in the Village of Wadsworth in Medina County, Ohio, in the Village of Ravenna in Portage County, Ohio, in the City of Cleveland in Cuyahoga County, Ohio, and in any or all other villages, cities or municipalities in said Counties of Medina, Wayne, Summit, Portage and Cuyahoga and in any or all counties in the State of Ohio, adjacent to said above mentioned counties or any of them, and in and upon any and all highways in said counties outside of the municipalities therein, and upon private rights of way in said counties, or either upon such highways or such private rights of way, and connecting by said street railroads any or all of the cities, villages and municipalities in said counties as well as the street railroads in such cities, villages and municipalities with each other to the end that said street railroads may be constructed, acquired, maintained and operated in

or through such cities, villages, municipalities and counties, or any of them, as a continuous system of street railroad; and to appropriate, condemn, acquire and own rights of way and necessary ground; and to do all things and have all powers, rights, franchises and
15 privileges conferred upon corporations organized for the purpose herein stated, by the Laws of the State of Ohio, and in connection with the foregoing purposes, and, as incident thereto, the manufacturing and generating of electricity for light, heat and power."

Said articles do not set forth any termini of any improvement the construction of which is included in the purpose for which said company was incorporated.

On or about the 29th day of December, 1902, said Traction Company purchased from The Northern Ohio Traction Company (a then existing interurban and street railway company formed by the consolidation of two other then existing companies having corporate powers similar to those of said defendant), various parcels of land in Summit and adjoining counties, and also certain electric street railroad lines in and along certain streets of the City of Akron, certain interurban railroad lines between Barberton and Kent, and all the other corporate property, real and personal, of said The Northern Ohio Traction Company, including depots, yards, shops and power houses.

Since the date aforesaid said Traction Company has been and now is engaged in the business of operating said lines of railway, with certain additions thereto, in, through and between the City of Cleveland, the City of Akron, the Villages of Kent, Barberton, Ravenna, and other villages and towns in the vicinity of the cities and villages above named.

Up to the year 1914, the power used by said Traction Company in the conduct of its business was obtained from at least
16 five different power houses located at various different places, including the Cities and Villages of Akron, Bedford, Cuyahoga Falls, Silver Lake Junction, Canton and Massillon, all which power houses used steam and not water power for the generation of electricity. Since said Traction Company's purchase from said Northern Ohio Power Company as hereinabove set forth it has been and is now using in its business the power generated at the steam power plant and hydro-electric power plant mentioned in Paragraph Twelfth hereof.

The action of said defendant in abandoning the power houses previously used by it and in purchasing and using the power plants mentioned in Paragraph Twelfth hereof was entirely voluntary upon its part and was not the result of any requirement of law or any public authority and was solely for its own convenience and benefit.

There is nothing in the nature of the business of the defendant Traction Company, or in the character of the country through which it operates its road and carries on its business, which makes it necessary for said defendant to own, possess or control said Everett, Sackett and A, B & C parcels, or any of them, or to obtain power from the power plants now erected thereon; and there are numerous other sites and places, including among numerous others, the sites of its abandoned power houses above mentioned, where said defendant could

have and can now locate any and all power houses necessary for its business; and said defendant can carry on its business and perform its duties to the public with equal dispatch and efficiency whether it obtain its electrical current and energy from the power plants
17 now situated upon said Everett, Sackett and A, B & C parcels or from other power plants situated outside the limits of the right of way of the plaintiff.

Fifteenth. No deed, lease, agreement, or other writing of any kind whereby the defendant Traction Company was vested with the ownership of the land conveyed to said Everett by Milbank's Executors as herein alleged, or with the ownership of any estate or interest in or lien upon or right or claim against said land, was ever recorded in the office of the County Recorder of the county wherein said land is situated or in any other public office; and the plaintiff charges and alleges that said Traction Company never was the owner of said Everett parcel or of any estate or interest therein or of any lien thereon at any time prior to its purchase of the same from said Northern Ohio Power Company on February 24, 1914, as hereinabove set forth.

The plaintiff further charges and alleges that if any such deed, lease, agreement, or other writing was ever made, the estate or interest so vested in said Traction Company was terminated and divested by said Everett's conveyance to The Northern Realty Company in December, 1910, as hereinabove set forth.

The plaintiff further charges and alleges that if said Everett parcel or any estate or interest in or lien upon said Everett parcel was ever owned by said defendant Traction Company, the same was null and void and of no effect as against the plaintiff.

The plaintiff further charges and alleges that neither said Realty Company nor said Traction Company was organized for the
18 purpose specified in the statute mentioned in Paragraph Second hereof, and that neither of said companies ever had any corporate power or authority to construct, maintain, or operate the steam power plant and hydro-electric plant mentioned in Paragraph Twelfth hereof, or any right or franchise to use said Everett, Sackett, and A, B & C parcels, or any of them, or the waters of the Cuyahoga River appurtenant thereto, for the development of hydro-electric power or any other public use.

Sixteenth. The plaintiff further charges and alleges that said Traction Company has not and never has had any corporate power or authority or any right or franchise to exercise the power of eminent domain for the purpose of acquiring power houses or the lands necessary therefor, except that said Traction Company has the power to appropriate land for an extension of an existing power house located within the limits of a municipality; and that said Traction Company's use of said Everett, Sackett, and A, B & C parcels, and each of them, is and always has been a private use and not a public use.

Seventeenth. The defendant Traction Company claims and asserts that all its acts with reference to the acquisition and use of said

Everett, Sackett, and A, B & C parcels, and of the waters of the Cuyahoga River appurtenant thereto, have been and are being taken and had pursuant to and in the rightful exercise of rights, powers and franchises duly granted to and conferred upon it by the State of Ohio, including the franchise claimed to have been granted to

19 The Northern Ohio Power Company by the incorporation of said company and claimed to have been purchased by the Traction Company as above set forth; that it is a public service corporation of the State of Ohio; that its use in its business of the electrical current and energy produced by its utilization of said Everett, Sackett and A, B & C parcels and of said waters appurtenant thereto, is a public use and constitutes a devotion of said parcels and waters to a public use under due authority from the State of Ohio, including said alleged franchise of said Northern Ohio Power Company, and that for that reason said parcels and said waters cannot be taken or appropriated by the plaintiff; and under this assertion and claim of statutory right and under an assertion of power from the State and under color of authority of state laws said Traction Company has entered upon and taken possession of said Everett, Sackett, and A, B & C parcels, and has commenced and is now continuing and threatens and intends to continue to use said parcels and said waters for the use and purpose aforesaid; all in direct violation and disregard of the rights, powers, privileges and franchises of the plaintiff hereinabove set forth and to the great injury and damage and impairment thereof.

Said Traction Company has further announced and is giving it out to the public that it is about to build further additional structures involving a further and more extensive use of said Everett, Sackett, and A, B & C parcels, and of the waters of said river appurtenant thereto, and is about to spend many thousand of dollars for that purpose. To this end said Traction Company, in the month

20 of June, 1916, presented to the Public Utilities Commission of Ohio a verified petition wherein it prayed for the consent and authority of said Commission to issue and sell \$2,053,000 par value of its First Lien and Refunding Mortgage Five Per Cent. Bonds and apply the proceeds thereof to the payment of the cost of certain improvements, betterments, and additions, a large portion of which involve an additional and more extensive use of the structures now upon said Everett, Sackett and A, B & C parcels. The prayer of said petition was granted, in part, by said Commission by an order dated July 21, 1916, a copy of which is hereto annexed marked Exhibit D and hereby made a part of this bill; and said Traction Company now asserts and claims the legal right and authority to issue the bonds authorized by said order, Exhibit D, and to make the same a lien upon the Everett, Sackett and A, B & C parcels and to make such additional use of said parcels; all in total disregard of and to the great injury and impairment of the rights and franchises of the plaintiff therein.

Eighteenth. The defendants' use of said Everett, Sackett and A, B & C parcels and of the waters of the Cuyahoga River appurtenant thereto in the manner and for the purpose herein set forth, makes

it impossible for the plaintiff to occupy its right of way or exercise its franchise or carry on its corporate purpose or attain its corporate objects or take advantage of or use the parcels of land in and to and against which it has acquired rights as herein set forth; and if the defendants continue their said use of said parcels, the State's grant and command to the plaintiff to develop hydro-electric power from the waters of said river will be nullified, the right of way and
 21 other property, rights, powers, privileges and franchises so granted to, acquired by, and vested in the plaintiff as hereinabove alleged, will be permanently appropriated to the use of the defendants, and will be thereby impaired, injured, damaged, destroyed and rendered useless and valueless, to the great and irreparable injury of the plaintiff, its stockholders and creditors; and unless the defendants be enjoined and restrained by this Court, they will continue said use of said parcels and of the waters of the Cuyahoga River appurtenant thereto and will thereby cause and inflict upon the plaintiff and the persons interested therein a continuing, permanent and irreparable injury, for which there is no adequate remedy at law.

Nineteenth. From and after the time of the adoption by the plaintiff of said resolution, Exhibit A, the parcels of land described therein were and have been subjected to its public use, and ever since that time they have been and now are legally and equitably subject to the plaintiff's right of way and franchise aforesaid, which right of way and franchise were and are exclusive as against all other persons and corporations, and legally and equitably free from the interference of any person or corporation; and the plaintiff has a prior and superior right to said parcels of land and a prior right and franchise over every person and corporation to appropriate and use said lands for its public use and an exclusive location and an exclusive franchise for the purpose of utilizing said lands for its corporate purpose. Said right of way and franchise were granted to the
 22 plaintiff by the State of Ohio under and by virtue of its said contract with said State, and said right of way and franchise were and are contract and property rights in the possession and use and enjoyment of which the plaintiff is entitled to and claims the protection of the Constitution of the United States and of the amendments thereof, as well as of Section 5 of Article XIII of the Constitution of the State of Ohio.

The effect and result of the defendants' use of said Everett, Sackett and A, B & C parcels and of the waters of the Cuyahoga River appurtenant thereto, is to oust the plaintiff of its right of way aforesaid and deprive it of its said right of way and franchise; and the defendants' said use of said parcels and of the waters appurtenant thereto amounts to and is an appropriation to the defendants' use of the said right of way of the plaintiff within the meaning of Section 5 of Article XIII of the Constitution of the State of Ohio, and also amounts to and is a taking and deprivation of its property for a private use and without compensation and without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and also an impairment of the contract of the

plaintiff with the State of Ohio within the meaning of Section 11 of Article I of said Constitution of the United States.

Neither of the defendants has paid or offered to pay nor taken any steps or proceeding to assess any compensation for such appropriation, taking, and deprivation; but, on the contrary, claim and assert the right to so use said Everett, Sackett, and A, B & C parcels and

23 the plaintiff and without the payment of compensation therefor; and said claim and assertion of right by said defendants and their said use of said parcels and waters is a cloud upon the title of the plaintiff to its right of way and franchise and a nuisance and a continuing trespass upon and permanent interference with said right of way and franchise.

Twentieth. At all times since its incorporation the plaintiff has been and now is actively and diligently and in good faith engaged in the prosecution of its corporate business and in proceeding to carry out and accomplish its corporate purpose. It has acquired the absolute ownership of various parcels of land necessary for the construction of its improvement and has binding and existing option for the purchase of other essential parcels; and the only reasons why it has not yet acquired all the lands and water rights necessary to enable it to commence and complete the physical construction of its plant are that it has been prevented by the illegal interference of the defendants and the immense amount of litigation in which it has become involved.

Twenty-First. In April, 1909, the plaintiff duly amended the plan of development adopted by it in June, 1908, as hereinabove alleged, so as to extend and enlarge its proposed plant and the output and product thereof, and in January, 1912, the plaintiff duly obtained a grant from the State of Ohio for a right of way over an additional portion or section of the Cuyahoga river so as to carry out such amended plan. Such amended plan provides for the utilization of

24 said Everett, Sackett, and A, B & C parcels, and said parcels are necessary to the use and exercise of the plaintiff's franchise as extended. Under said amended plan and extended franchise the plaintiff if undisturbed in the due, proper and legal exercise and use thereof, could and would produce and sell hydro-electric power to the extent of not less than 20,327 electric horse power for continuous service, ten hours daily, or a net delivery of 52,560,000 kilowatt hours; and by charging fair and reasonable rates for the service rendered by the plaintiff to the public in producing and furnishing such power, the plaintiff could and would earn and receive a net income of at least \$30,000 per month over and above all expenses and a reasonable percentage upon the value of the physical properties constituting the plant or improvement necessary to develop and sell such power and a reasonable percentage for depreciation in the value of such physical properties; and the reasonable earning capacity and the reasonable usable value of the plaintiff's said franchise has been and is \$30,000 per month at the least; and the natural, ordinary, and necessary effect and consequence of the act

of the defendants herein complained of has been and is and, until enjoined, will continue to be the exclusion of the plaintiff from the use and exercise of its said franchise; and by reason of such wrongful exclusion from the use and exercise of its franchise the plaintiff has already suffered damages in excess of \$1,980,000, no part of which has been paid, and unless the defendants be enjoined the plaintiff will continue to suffer damages at the rate of at least \$30,000 per month, to recover which, as and when entitled thereto, the plaintiff would be compelled to institute and prosecute, at great
25 expense and with great vexation, delay, and hazard, a multiplicity of suits at law, which, by the principles of equity, it should not be compelled to do.

Twenty-second. By reason of the premises, the right of way granted to the plaintiff by the State of Ohio is being appropriated to the use of the defendants for a private use and without the payment, assessment or securing of any compensation therefor, in contravention and violation of Section 5 of Article 13 of the Constitution of the State of Ohio, and the obligations of the plaintiff's contracts with the State of Ohio herein set forth are being impaired by laws of said State and the acts and doings of the defendants under color of authority of such laws and under an assertion of power from the State; all in contravention and in violation of Section 10 of Article I of the Constitution of the United States. In like manner and by like means the plaintiff's property is being taken and the plaintiff is being deprived of its property without due process of law and without compensation; all in contravention and in violation of the Fourteenth Amendment to the Constitution of the United States; and the plaintiff invokes the jurisdiction of this Court upon those grounds for the purpose of enforcing its rights under said Constitution and the amendments thereof.

Forasmuch, therefore, as the plaintiff is without remedy save in this Court, sitting in equity, it therefore prays:

1. That The Northern Ohio Traction and Light Company, and
26 The Northern Ohio Power Company be made parties defendant to this bill of complaint and required to answer the same, but not under oath, an answer under oath being hereby expressly waived.
2. That the plaintiff's contracts with the State of Ohio hereinabove alleged, and the right of way and other property, rights, powers, privileges and franchises of the plaintiff hereinabove set forth, be established and adjudged by decrees of this Court.
3. That the various acts and proceedings hereinabove complained of as violating the plaintiff's rights under the Constitution of Ohio and the Constitution of the United States and the amendments thereof, and the statutes and laws under color of which the defendants are doing said acts and taking said proceedings, be adjudged and declared unconstitutional and void, because resulting in an impairment of the obligations of the plaintiff's said contracts with the State and in a taking of the plaintiff's property without due process of law.

4. That the defendants herein, their officers, attorneys, agents, servants, workmen and contractors, and all persons, firms, corporations and officers whatsoever be forever enjoined and restrained from in any way appropriating, trespassing upon, interfering with, or impairing or injuring the right of way or any other of the property, rights, powers, privileges and franchises of the plaintiff; and, in particular, that said defendants and all such other persons be forever enjoined and restrained (a) from using the parcels of land mentioned in Paragraph Sixth hereof, or any structures erected

27 thereon, or the waters of the Cuyahoga River which flow to, over and from said parcels, for the purpose of developing, generating, or producing light, heat, or power, (b) from using said parcels or structures or taking or diverting or appropriating all or any part of the waters of the Cuyahoga River or its tributaries at any point or for any purpose which would in any way injure or affect the property, rights, powers, privileges and franchises of the plaintiff or in any manner interfere with the plaintiff's possession and use of its said right of way or with the prompt and proper prosecution of the plans of development adopted by the plaintiff as set forth in this bill; (c) from asserting or claiming that the defendants' use of said parcels, structures, and waters is a public use or constitutes a devotion of said parcels to a public use, or in any other manner clouding the title of the plaintiff to its right of way and franchises; (d) from in any manner or by any means interfering with the plaintiff's exercise of its corporate rights, powers and franchises, including its right to acquire, by an exercise of the power of eminent domain, the absolute title to and ownership of said parcels or the right to control, diminish and absolutely prevent the flow of any water of the Cuyahoga River to or over the same; (e) from erecting additional structures or improvements upon said Everett, Sackett and A, B & C parcels of land, or any of them, or placing any lien or encumbrance thereon under color of authority of the order of the Public Utilities Commission set forth in Paragraph Seventeenth hereof.

5. That a preliminary injunction in accordance with the last preceding prayer be forthwith granted pending the hearing
28 and determination of this suit to continue in force during the pendency of this suit and until the granting of a permanent injunction in accordance with the said last preceding prayer.

6. That the defendants be required and compelled, by mandatory injunction or other suitable process of the Court, to remove such structures and devices as have been already erected upon said parcels, or to grant and convey such structures and devices to the plaintiff for use by it in connection with its said rights and franchises.

7. That a Receiver be appointed forthwith to take possession of the structures and devices erected and constructed upon said parcels as herein alleged and to hold the same and all matters and things incidental thereto and connected therewith, in order that the same may be applied and disposed of in accordance with the decree of this Court to be entered herein.

8. That, as incidental to such relief, the defendants be decreed to account for and pay over to the plaintiff the damages occasioned to it by their violations and takings of the right of way, property, rights, powers, privileges and franchises of the plaintiff down to the time of the issue of the injunction prayed for herein; and that such damages be assessed by this Court upon the entry of the decree herein.

9. That the plaintiff have all such other, further, different and general relief as may be proper and just in the premises.

10. That the plaintiff have writs of injunction and a receiver in conformity with the prayers of this bill; that all proper orders and decrees be entered herein, all proper inquiries made, accounts taken and proceedings had, in conformity with law and the practice of this Court; and that the plaintiff have a writ of subpoena directed to the defendants commanding them to appear and answer this bill of complaint and abide and perform all such orders and decrees as to the Court shall seem proper and as may be required by the principles of equity; and the plaintiff will ever pray.

THE CUYAHOGA RIVER POWER
COMPANY,

By WILLIAM Z. DAVIS,

Its Solicitor.

JOHN L. WELLS,
CARROLL G. WALTER,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Willard R. Kimball, being duly sworn, deposes and says: That he is an officer of the plaintiff named in the foregoing bill of complaint, to wit, the president thereof; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason this verification is made by him instead of by the plaintiff is that the plaintiff is a corporation, and that the sources of his information and the grounds of his belief are facts which have come to his knowledge in the course of his duties as president of the plaintiff.

WILLARD R. KIMBALL.

Sworn to before me this 4th day of August, 1916.

THOMAS ROBINSON,
Notary Public, Bronx County.

Cert. filed in New York County, No. 221.

EXHIBIT A.

Resolution of June 4, 1908.

Whereas, This company has attempted to purchase various pieces of real estate and property hereinafter described, and has made offers of purchase prices and compensation to the several owners and claimants of said property, respectively, but has been unable to agree with said owners and claimants as to the amount to be paid for said real estate and property;

And, Whereas, It is necessary and essential in order to carry out the purposes of its organization, that this company acquire said various pieces of real estate and property and for the purpose of acquiring, erecting, building, maintaining and operating a system of dams in the Big Cuyahoga River in the State of Ohio; of raising and maintaining a head of water; of constructing and maintaining canals, locks and raceways; of regulating and carrying said head of water to its plants or power houses where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes; of acquiring, holding and selling franchises and privileges and supplying the same to municipal corporations; of acquiring by lease, purchase or otherwise, and possessing, holding and selling such real estate and personal property as may be necessary for the proper conduct of said business, and to do any and all other things necessary and incident to any of its said purposes;

Now, therefore, be it Resolved, That it is necessary and essential, for the purposes aforesaid, to appropriate and condemn, and this company does hereby appropriate and condemn, each and all of the following described real property and estate for the uses and purposes aforesaid:

The property now owned by Henry A. Everett and The Northern Ohio Traction & Light Company, lying and being in Cuyahoga Falls Township, Summit County, Ohio, and described as follows:

Beginning at the point of intersection of the center of the Cuyahoga River and the North and South Township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees, 30 minutes east 100 feet; thence easterly and southeasterly along the northerly bank of said Cuyahoga River 100 feet distant from the center line of said River, following the meandering of the same, to a point on the line between the property of said Henry A. Everett and the property of the A. B. & C. R. R. Company, said point being 100 feet distant from the center of the Cuyahoga River, measured at right angles with the same; thence south 1 degree, 20 minutes west along said line between the property of Henry A. Everett and the property of the A. B. & C. R. R. Company to the southwest corner of the property of said A. B. & C. R. R. Company; thence south 88 degrees east along the south line of the property of the A. B. & C. R. R. Company, said line being the dividing

line between the property of the A. B. & C. R. R. Company and the property of Henry A. Everett, to a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with the same; thence southeasterly and northeasterly along the northerly bank of the Cuyahoga River 100 feet distant from the center line thereof, and following the meanderings of the same, to a point on a line of the land of said Henry A. Everett, said line being an extension northerly of the east line of Tract No. 3 Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga River, measured at right angles with the same; thence northerly along said line to a stone pipe; thence northerly along the high bank of the Cuyahoga River and one rod westerly of same the following courses and distances: North 34 degrees, 35 minutes east 264 feet; thence north 27 degrees, 35 minutes east 286.44 feet; thence north 2 degrees, 30 minutes west 116.16 feet; thence north 24 degrees, 10 minutes west 138 feet; thence north 8 degrees, 40 minutes east 107.6 feet; thence north 19 degrees, 31 minutes east 108.24 feet; thence north 36 degrees; 40 minutes east 168.3 feet; thence north 53 degrees, 40 minutes east 454.7 feet; thence north 35 degrees east 280.7 feet to the northeast corner of the lot owned by Tom Patterson; thence northerly following along the westerly bank of said Cuyahoga River to the southeast corner of the property of the Falls Rivet & Machine Company; thence along the line between the land of the Fall Rivet & Machine Company and the property of Henry A. Everett to a point on the westerly bank of said River, where said boundary line crosses said River; thence south 75 degrees east 157 feet along the line between the property of The Falls Rivet & Machine Company and the lands of said Henry A. Everett to a point on the top of the bank of the easterly side of said Cuyahoga River; thence south 23 degrees west 118.80 feet along the top of said east bank; thence south 63 degrees east 52 feet to the west line of Water Street, where an iron grate bar is set; thence south 22 degrees, 30 minutes west 660 feet along the west line of Water Street to an iron pin; thence south 17 degrees, 30 minutes west 663.34 feet along the west side of Water Street to an iron pin; thence north 63 degrees, 37 minutes west 128.4 feet along north line of land formerly belonging to C. S. Sill to an iron pipe; thence south 31 degrees, 30 minutes west 317.46 feet along the west line of the same land to an iron pipe; thence south 41 degrees, 30 minutes west 341.88 feet along the west line of said Sill's land to an iron pipe; thence southerly and westerly along the southerly bank of the said Cuyahoga River and approximately 100 feet distant from the center line of said River, following the meanderings of same to a point on the north and south township line between Portage Township and Cuyahoga Falls township; thence north 0 degrees, 30 minutes east along said township line 100 feet to the place of beginning; containing 40 acres, more or less, with all the privileges, easements, rights and appurtenances thereunto belonging.

Also the property now owned by The Akron, Bedford and Cleveland Railroad Company and The Northern Ohio Traction & Light

Company in Cuyahoga Falls Township, Summit County, Ohio, and described as follows:

Beginning at an iron pin at the southwest corner of said Railroad Company's land, said pin being on an island in the Cuyahoga River; thence north 1 degree, 20 minutes east along said Railroad Company's west line to a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with the same; thence southeasterly to the south line of said Railroad Company's property at a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence along the south line of said Railroad Company's land to the place beginning; containing 0.3 acres, more or less, with all the privileges, easements, rights and appurtenances thereunto belonging, all of the above property being in the Township of Cuyahoga Falls.

Also the property now owned by The Turner, Vaughn & Taylor Company in the village of Cuyahoga Falls, Summit County, Ohio, and described as follows:

Beginning at the intersection of the westerly high bank of the Cuyahoga River, and the north line of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio; thence westerly along the north line of Portage Street 49½ feet; thence southerly
35 across said Portage Street to the south line of the same; thence easterly along the south line of said Portage Street 49½ feet to the said westerly high bank of the Cuyahoga River; thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, across Broad Street in said Village of Cuyahoga Falls, Summit County, Ohio, to the dividing line between the property of said Turner, Vaughn & Taylor Company and the property of The Walsh Paper Company; thence easterly across the Cuyahoga River to the southeast corner of the property of said Turner, Vaughn & Taylor Company on the easterly high bank of said Cuyahoga River; thence northerly along the high bank of said Cuyahoga River on the easterly side thereof and following the meanderings of the same across Board Street in said Village of Cuyahoga Falls, and across Portage Street also in said Village of Cuyahoga Falls, to the northerly line of said Portage Street; thence westerly along the north line of said street to the place of beginning; containing approximately 6.3 acres, more or less, with all the privileges, rights, easements and appurtenances thereunto belonging.

Also the property now owned by Cornelius M. Walsh and The Walsh Milling Company in the Village of Cuyahoga Falls, Summit County, Ohio, and described as follows:

Parcel No. 1 (Walsh Milling Co.).

Beginning at the intersection of the center of the Cuyahoga River at the north side of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio; thence westerly along the north side of
36 Portage Street to the intersection of the high bank of the west side of the Cuyahoga River and the north side of Portage

Street; thence northerly along the said high bank on the westerly side of the Cuyahoga River to a point 30 feet north of the crest of the dam, as now located, of the Walsh Milling Company; thence easterly to the center of the Cuyahoga River to a point approximately 30 feet north of the crest of the aforesaid dam; thence southerly along the center of the Cuyahoga River to the place of beginning; containing approximately 0.5 acres, with all the privileges, rights, assessments and appurtenances thereunto belonging.

Parcel No. 2.

Beginning at a point in the center of Prospect Street in the Village of Cuyahoga Falls, Summit County, Ohio, on the high bank of the Cuyahoga River on the easterly side thereof; thence westerly along the center of said Prospect Street to the high bank on the westerly side of said River; thence northerly along the high bank of said river to the north line of said C. N. Walsh's property where same joins the property of the Walsh Paper Company; thence easterly, following the said north line of C. M. Walsh's property across the Cuyahoga River to the high bank on the easterly side of same; thence southerly along the high bank of the easterly side of said Cuyahoga River to the place of beginning; containing 0.9 acres, more or less, with all the privileges, rights, easements and appurtenances thereunto belonging.

Also the property now owned by The Walsh Paper Company and Cornelius M. Walsh, in the Village of Cuyahoga Falls, Summit County, Ohio, and described as follows:

37 Beginning at the intersection of the Westerly High bank of the Cuyahoga River in the Village of Cuyahoga Falls, Summit County, Ohio, and the dividing line between the property of said Walsh Paper Company and the property of Turner, Vaughn & Taylor Company; thence Southerly along the high bank of the Cuyahoga River on the Westerly side thereof and following the meanderings of same, to the line between the property of the said Walsh Paper Company and the property of C. M. Walsh; thence Easterly across the Cuyahoga River to the Southeast corner of the property of said Walsh Paper Company, said corner being on the Easterly high bank of said River; thence Northerly along the high bank of said River on the Easterly side thereof and following the meanderings of same to the Southeast corner of the property of Turner, Vaughn & Taylor Company, said corner being also the dividing line between the property of Turner, Vaughn & Taylor Company and the said Walsh Paper Company; thence Westerly across the Cuyahoga River to the place of beginning. Containing approximately 0.8 acres, more or less, with all the privileges, easements, rights and appurtenances thereunto belonging.

Also the property now owned by The Falls Rivet & Machine Company, in the Village of Cuyahoga Falls, Summit County, Ohio, and described as follows:

Parcel No. 1.

Beginning at the point of intersection of the center of the Cuyahoga River and the North line of Portage Street, in the Village of Cuyahoga Falls, Summit County, Ohio; thence Northerly
 38 along the center of said River to a point approximately 30 feet North of the crest of the Walsh Milling Company's dam, as now located; thence Easterly to a point on the high bank of the Cuyahoga River on the Easterly side thereof, said point being approximately 30 feet North of the crest of the aforesaid Walsh Milling Company's dam; thence Southerly along the high bank on the Easterly side of the Cuyahoga River to the North line of Portage Street; thence Westerly along the North line of Portage Street to the place of beginning. Containing approximately 0.4 acres more or less with all privileges, rights, easements and appurtenances thereunto belonging.

Parcel No. 2.

Beginning at a point on the Westerly bank of the Cuyahoga River, said point being north $34^{\circ} 35'$ East 380.16 feet, and North 32° East 89.1 feet from a stone set in the North line of Chestnut Street in the Village of Cuyahoga Falls, Summit County, Ohio, both of these lines being along lines of land owned by the heirs of J. Millbank; thence in a line which passes through a recess which is cut into a large rock near the East edge of the water of the Cuyahoga River to receive the end of the timber of the "Chuckery" dam, and through a point on the West side of the gorge South of the husk of wheel house, which point is about 24 feet South of a mark cut in the perpendicular rock on said West side near the bottom by F. D. Paul and G. B. Turner, the East end of said line being on the top of the East bank of the river; thence north 31 degrees, 45 minutes east 237.6 feet; thence north 10 degrees east 258.72 feet; thence north 14 degrees east 178.21 feet; thence north 80 degrees 45
 39 minutes west 99 feet along the south line of the Cyrus Prentiss tract. The west end of this line may also be found by beginning in the east line of Front Street, 1.69 chains north 9 degrees, 15 minutes east of the first angle in the east line of said Front Street south of Broad Street, and which line is also 21 links south of the center line of Prospect Street; thence along the easterly line of land belonging to Fannie S. Beebe to the southeasterly corner of her land; thence along the southerly line of said Fannie S. Beebe's land one rod; thence in a southerly direction to a point one rod westerly from the place of beginning; thence one rod east to place of beginning; containing approximately 1.5 acres, more or less, with all the privileges, rights, easements and appurtenances thereunto belonging.

Also the property now owned by Fannie V. Sackett, in Portage Township, Summit County, Ohio, and described as follows:

Parcel One.

Being a part of tract two in Portage Township, Summit County, State of Ohio, and is a part of a tract of 120.79 acres of land and marked and distinguished, upon the map of the property sold under the decree in the case of John J. Palmer v. The Portage Canal & Manufacturing Company et al., in the Court of Common Pleas, Summit County and State of Ohio, and being a part of a parcel of land now known as the George Sackett land and bounded as follows:

Commencing at a point in the center of the Cuyahoga River at its intersection with the township line between Portage Township
40 and the Village of Cuyahoga Falls; thence northerly along said Township line 100 feet; thence following the northerly bank of said River in a westerly direction approximately 100 feet distant from the center of said river, and following the meanderings thereof to the westerly line of the said George Sackett property; thence southerly on the extreme westerly line of the said George Sackett property to a point 100 feet from the center of said river on the southerly bank thereof; thence easterly along the southerly bank of said river, and following the meanderings thereof, approximately 100 feet distant from the center thereof to the township line on the easterly side of Portage Township; thence northerly along said Township line to the place of beginning; containing about ten acres, with all the privileges, rights, easements and appurtenances thereunto belonging.

Parcel Two.

Being a part of said tract two, Portage Township, County and State as above, and being the water power of the Cuyahoga River, and the rights, privileges, easements and rights of way and appurtenances attached to a tract of 97.40 acres of land in said tract two, which tract includes the 55 acres above described and 42.40 acres of land lying westerly therefrom, which were reserved in a deed from George Sackett and wife to Michel Metzler, Jr., recorded in Vol. 101, page 205, Summit County Records, and consisting of the right to take and conduct the waters of the Cuyahoga River over and across said granted premises at such times, and in such quantities, and in such manner as he may choose.

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Parcel Three.

Situated in the Township of Portage, County of Summit and State of Ohio, and known as being the right and privilege of using, controlling, diverting and conveying the water power and water of the Cuyahoga River as the same now flows or hereafter may flow over and across the lands owned by William J. Babb and Eliza K. Babb, his wife; L. S. Fowler and Lucretia M. Fowler, his wife; Jacob Schenck and Frederica Schenck, his wife, on the 25th day of October, 1892, in Tracts Nos. one, two and four of said Township of Portage; it being expressly understood that none of the land of this afore-

said parcel shall be occupied or used for dams or other structures, and no land except the use of that over which the waters of the said Cuyahoga River flow, and for the purposes aforesaid, intending hereby to acquire all the lands, rights, interests, easements and appurtenances conveyed to said George Sackett by the above mentioned parties by deed of date of Oct. 25th, 1892, and recorded in Vol. 184, page 191, of Summit County Records.

Parcel Four.

Situated in the Township of Portage, County and State aforesaid, and known as being a part of tract 4 in said Township and bounded and described as follows: being a strip of land forty (40) feet in width beginning where the line fence between John Abele's land and Nolte's land intersects the tract line; thence Southerly along the line of said Nolte to the Soap Works property and thence Westerly along the line of said Soap Works property to the Cuyahoga River together with the right to control, use and divert the water of the Cuyahoga River flowing along, across or through the land of said Abele, to such uses or purposes and in such manner as the grantee, his heirs or assigns may desire. The said strip of land containing about one and $1\frac{1}{4}$ acres of land, with all the rights, privileges, easements and appurtenances thereunto belonging.

The above parcel of land and the rights, privileges, easements and appurtenances thereunto belonging includes all the rights, privileges, easements and interests conveyed to the grantor by John Abele and Agatha Abele by deed dated April 3rd, 1901, and recorded in Vol. —, page —, of the Summit County Records, and the same is made subject to all the conditions of the aforesaid deed.

Also the property now owned by Henry A. Robinson, in Portage Township, Summit County, Ohio, and described as follows:

Situated in the City of Akron, formerly Township of Portage, County of Summit and State of Ohio and known as a part of tract No. 4 and also a part of 37.54 acres deeded to Edward Roepke by Joseph Babb by deed recorded in Summit County Records Book 109, page 580. Beginning at a stake which may be found by commencing in the center of the public road and running North $34^{\circ} 45'$ West about 273 feet along the East line of the private road 12 feet wide to a stake which is the beginning point of the land hereby conveyed: thence North $17^{\circ} 45'$ East 240 feet to a stake; thence North $49^{\circ} 45'$ West 180 feet to a stake; thence South $11^{\circ} 20'$ West 200 feet to a stake; thence $34^{\circ} 45'$ East along East line of said private road 12 feet wide 180 feet to the beginning.

Also beginning at the same beginning point and running South $17^{\circ} 45'$ West 115 feet to the center of the Cuyahoga River, thence up the center of river North $24^{\circ} 15'$ West 201.50 feet; thence North $11^{\circ} 20'$ East 75 feet to the most Westerly corner of the first described piece of land; thence South $34^{\circ} 45'$ East 180 feet to the beginning and containing 1.04 acres in both parcels. The private road herein mentioned is to be kept open for the use and benefit of Edward Roepke and The Akron Soap Company and said Roepke and those holding through or under them.

The above described premises are also subject to the following conditions contained in the conveyance from Edward Roepke and wife to The Akron Soap Company dated July 23rd, 1892, and recorded in Book 197 on page 289 of Summit County Records.

Also the property now owned by Hattie Adelle Fenton and Luna Alice Dover in the Village of Cuyahoga Falls, Summit County, Ohio, and described as follows:

Being a piece of land on the west bank of the Cuyahoga River, bounded on the north by Bridge Street, on the east by the Cuyahoga River, on the south by land of S. Croy and on the west by land of Loomis, being 0.67 acres, with the right of passage westerly to Front Street; with all the privileges, easements, rights and appurtenances thereunto belonging.

And be it Further Resolved, That proceedings be immediately instituted in a court of competent jurisdiction in Summit County, Ohio, to assess the compensation to be paid for the said property and real estate to the respective owners thereof.

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EXHIBIT B.

Joint Petition of the Northern Ohio Traction & Light Company and The Northern Ohio Power Company to the Public Utilities Commission of Ohio.

Petitioners in this their joint petition say that they are each corporations organized and existing under and by virtue of the laws of State of Ohio; that each has its principal place of business at Akron, Summit County, Ohio; that said The Northern Ohio Traction and Light Company is formed for the purpose of purchasing, acquiring, building, extending, leasing, equipping, owning, operating and maintaining street railroads, using other than animal power as a motive power for the transportation of passengers, packages, express matter, United States mail, baggage and freight, in the streets, avenues, public ways and places in the City of Akron, Summit County, Ohio, in the Village of Cuyahoga Falls, in said Summit County, Ohio, in the Village of Barberton in said Summit County, Ohio, in the Village of Doylestown, Wayne County, Ohio, in the Village of Wadsworth in Medina County, Ohio, in the Village of Ravenna, in Portage County, Ohio, in the City of Cleveland in Cuyahoga County, Ohio, and in any or all other villages, cities or municipalities in said counties of Medina, Wayne, Summit, Portage and Cuyahoga and in any or all counties in the State of Ohio adjacent to said above-mentioned counties or any of them, and in and upon any and all highways in said counties outside of the municipalities therein,

45 and upon private rights of way in said counties, or either upon such highways or such private rights of way, and connecting by said street railroads any or all the cities, villages and municipalities in said counties, as well as the street railroads in such cities, villages and municipalities with each other, to the end that

said street railroads may be constructed, acquired, maintained and operated in or through such cities, villages, municipalities and counties, or any of them, as a continuous system of street railroad; and to appropriate, condemn, acquire, and own rights of way and necessary ground; and to do all things and have all powers, rights, franchises and privileges conferred upon corporations organized for the purpose herein stated, by the laws of the State of Ohio, and in connection with the foregoing purposes, and, as incident thereto, the manufacturing and generating of electricity for light, heat and power; that said The Northern Ohio Power Company is formed for the purpose of acquiring, erecting, building, maintaining and operating a dam or series of dams in the Cuyahoga River, Summit County, in the State of Ohio, to raise and maintain a head of water, of constructing and maintaining canals, locks and race ways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of using said water as power in generating and producing electricity; of constructing, erecting and maintaining tubes, pipes or conduits through which electricity may be carried and transmitted, and a line or lines of poles whereon to attach or string

46 wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating, transmitting and selling electricity for light, heat, power and other purposes; of supplying and selling electricity to municipalities, interurban, street and electric railroad companies and other public agencies; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all other things necessary and incident to any of said purposes. The improvement said company will construct not to be located at a single place will be for the purpose of transmitting and conducting electricity and will have its termini the counties of Cuyahoga and Tuscarawas and with its main line and branches will pass in or through the counties of Cuyahoga, Summit, Medina, Portage, Stark and Tuscarawas, in said state.

Petitioners further say that said The Northern Ohio Power Company owns the legal title to a certain tract of land situated in Cuyahoga Falls and Portage Townships in said Summit County, through which tract of land flows the Big Cuyahoga River; that said Power Company has developed the fall of said River for the purposes for which said Power Company was formed, and has erected therein a dam, and has constructed on said tract of land a steam power plant and a hydro-electric plant; that said Power Company owns in connection therewith the legal title to certain tracts of land used

47 as rights of way for transmission lines, and has erected thereon poles and wires and other structures incident thereto, and said Power Company owns the legal title to parcels of land other than those above mentioned; that said Power Company never has,

and is not now engaged in business, and has no contracts for supplying electricity to any person or persons, firms, corporations or municipalities other than with said The Northern Ohio Traction & Light Company.

Petitioners further say that said The Northern Ohio Traction & Light Company owns and operates street, interurban and suburban railways, and has entered into contracts with individuals, firms, corporations and municipalities for furnishing electricity for light, heat and power purposes; that all of said property of said Power Company is necessary for the uses and purposes of said Traction Company, and that it is necessary for said Traction Company to acquire said property to properly carry on the purposes and objects for which said Traction Company was formed, and to carry out and perform its contracts and duties as a public utility, and that it is necessary for said purposes for said Traction Company to acquire all of the property, franchises, rights and privileges of said Power Company.

Petitioners further say that said The Northern Ohio Traction and Light Company has advanced and paid all of the moneys necessary for the acquisition and development of said Power Company's property, including said dam, power houses, transmission lines, and all of the structures and equipments thereof and incident thereto, and that said Power Company is now indebted to said Traction Company approximately in the sum of One Million, Nine Hundred Seventy-nine Thousand, Five Hundred Forty-nine and 68/100 (1,979,549.68) Dollars; that said Power Company is unable to further finance, extend and develop its properties, and is unable to pay in cash or acceptable securities said sum so owing to The Northern Ohio Traction & Light Company; that said Power Company has no other indebtedness of any kind or character.

Said petitioners further say that said Power Company has proposed to said Traction Company to sell all of the property, franchises, rights and privileges of said Power Company to said Traction Company for and in consideration of said Traction Company cancelling said indebtedness and releasing said Power Company from all of its said obligation and indebtedness to said Traction Company; that the Directors of said Companies respectively unanimously authorized the execution of said sale, prescribing the terms, considerations and conditions thereof, as above set forth; that the Directors of said Companies respectively, on proper notice according to law, called a meeting of the stockholders of each of said Companies for the purpose of assenting to said proposal of sale, and that at said meetings of said stockholders the holders of more than two-thirds of the stock of each Company assented thereto.

Wherefore petitioners pray that this Commission, if it deem the same necessary, fix a time and place for the hearing hereon; that

49 this Commission consent to and approve said sale, and make such order in the premises as it may deem proper and the circumstances require.

THE NORTHERN OHIO POWER
COMPANY,

(Signed) By C. H. HOWLAND,
Its President.

(Signed) T. W. WAKEMAN,
Its Secretary.

THE NORTHERN OHIO TRACTION
& LIGHT COMPANY,

(Signed) By HENRY A. EVERETT,
Its President

(Signed) CHARLES F. MOORE,
Its Secretary.

STATE OF OHIO,
Summit County, ss:

Charles H. Howland and T. W. Wakeman, being severally sworn, on their oath say that they are President and Secretary respectively of said The Northern Ohio Power Company, and that the facts, statements and averments contained in the foregoing joint petition of said The Northern Ohio Power Company and The Northern Ohio Traction & Light Company, are true, as they verily believe.

(Signed) C. H. HOWLAND,
*President of The Northern Ohio
Power Company.*

(Signed) T. W. WAKEMAN,
*Secretary of The Northern Ohio
Power Company.*

50 Sworn to before me by the said Charles H. Howland and T. W. Wakeman, and by them subscriber in my presence this 27th day of January, A. D. 1914.

(Signed) N. O. MATHER,
[SEAL.] *Notary Public.*

STATE OF OHIO,
Summit County, ss:

Henry A. Everett, being first duly sworn, upon his oath says that he is the President of The Northern Ohio Traction & Light Company, and that the facts, statements and averments contained in the foregoing joint petition of said The Northern Ohio Power and said The Northern Ohio Traction & Light Company are true, as he verily believes.

(Signed) HENRY A. EVERETT,
*President of The Northern Ohio
Traction & Light Company.*

Sworn to before me by the said Henry A. Everett and by him
subscribed in my presence this 27th day of January, A. D. 1914.

(Signed)

N. O. MATHER,

[SEAL.]

Notary Public.

STATE OF OHIO,

Summit County, ss:

Charles F. Moore, being duly sworn, upon his oath says that he
is Secretary of The Northern Ohio Traction & Light Com-
pany, and that the facts, statements and averments contained
in the foregoing joint petition of said The Northern Ohio
Power Company and said The Northern Ohio Traction & Light
Company, are true, as he verily believes.

(Signed)

CHARLES F. MOORE,
*Secretary of The Northern Ohio
Traction & Light Company.*

Sworn to before me by the said Charles F. Moore, and by him
(Signed)

N. O. MATHER,

[SEAL.]

Notary Public.

subscribed in my presence this 27th day of January, A. D. 1914.

ROWLEY, MATHER & EAGLESON,

Attorneys.

52

EXHIBIT C.

Before the Public Utilities Commission of Ohio.

No. 116.

In the Matter of the Joint Application of THE NORTHERN OHIO
TRACTION AND LIGHT COMPANY and THE NORTHERN OHIO POWER
COMPANY for the Consent and Approval of the Commission to the
Purchase and Sale of Property.

The Northern Ohio Traction and Light Company and The North-
ern Ohio Power Company, corporations organized under the laws of
the State of Ohio, with their offices and principal places of business
located at Akron, Summit County, Ohio, having, on the thirtieth
day of January, 1914, filed their joint petition praying for the con-
sent and approval of the Commission to the sale, by said The North-
ern Ohio Power Company to said The Northern Ohio Traction and
Light Company, of all the property, franchises, rights and privileges
of said The Northern Ohio Power Company, as fully set out in said
petition, and the time for hearing said matter having been fixed for
Friday, February thirteenth, 1914, at nine o'clock a. m., and hav-
ing been heard in said day and the further consideration
thereof continued from day to day, the same came on this
day for final consideration upon the petition, the evidence
and exhibits.

53

After considering the pleadings, hearing the evidence and examining the exhibits, and being fully advised in the premises, and it appearing that the consummation of said proposed transfer of property will conserve the economical operation of the same, and it appearing further that the service furnished the public by said The Northern Ohio Traction and Light Company will be improved thereby, and that the public will be furnished adequate service for a reasonable and just charge, rate, rental or toll, and that no diminution of service or increase in rates will result therefrom, the Commission is satisfied that the prayer of said petition should be granted. It is therefore,

Ordered, That said The Northern Ohio Power Company be and it is hereby authorized to sell and transfer to said The Northern Ohio Traction and Light Company, all its property, franchises, rights and privileges, consisting of the legal title to a certain tract of land situated in Cuyahoga Falls and Portage Townships in Summit County, through which tract of land flows the Big Cuyahoga River, the dam erected therein and the steam power plant and hydro-electric plant erected on said land; the legal title to certain tracts of land used as rights of way for transmission lines and the poles, wires and other structures erected thereon, as fully set out in said petition, which is hereby made a part of this order by reference, for and in consideration of said The Northern Ohio Traction and Light Company cancelling the indebtedness of said The Northern Ohio Power

Company to said The Northern Ohio Traction and Light
54 Company created and incurred by the said The Northern Ohio Traction and Light Company advancing and paying all of the moneys necessary for the acquisition and development of said The Northern Ohio Power Company's property, which said indebtedness amounts to the approximate sum of One Million, Nine Hundred and Seventy-nine Thousand, Five Hundred and Forty-nine Dollars and Sixty-eight Cents (\$1,979,549.68); and said The Northern Ohio Traction and Light Company is hereby authorized to purchase said property for and in consideration of the cancellation and release of said The Northern Ohio Power Company from all of its said indebtedness and obligations to said The Northern Ohio Traction and Light Company. It is further

Ordered, That the authority herein granted may be exercised from and after the date of this order.

THE PUBLIC UTILITIES COMMISSION
OF OHIO.

O. H. HUGHES, *Chairman*;
C. C. MARSHALL,
E. W. DOTY,

Commissioners.

[SEAL.]

Dated at Columbus, Ohio, this nineteenth day of February, 1914

EXHIBIT D.

Before the Public Utilities Commission of Ohio.

No. 872.

In the Matter of the Application of THE NORTHERN OHIO TRACTION AND LIGHT COMPANY for Consent and Authority to Issue and Sell its First Lien and Refunding Mortgage Five Per Cent. Bonds.

This day, after full hearing, due notice of the time and place of which was given to all parties in interest, this matter came on for final consideration upon the application of The Northern Ohio Traction and Light Company, a corporation organized under the laws of the State of Ohio, for consent and authority to issue its First Lien and Refunding Mortgage, five per cent. Bonds of the total principal sum of Fourteen Million and Seventy-five Thousand Dollars, the proceeds from Four Million Dollars, principal sum thereof, to be used to pay \$1,800,000.00 of six per cent. Collateral Trust Notes issued August 1, 1913, and July 1, 1915, to pay certain underlying First Mortgage Bonds of the Tuscarawas Railroad Company, of the principal sum of \$100,000.00, which matured June 1, 1916, to pay bonds of the Lake View Land and Improvement Company, of the principal sum of \$47,000.00 which matured July 1, 1916, and to be applied toward the payment of the cost of making certain betterments, additions and improvements to applicant's property and railway, and Ten Million and Seventy-five Thousand Dollars, principal sum thereof, deposited with the trustee under said mortgage in pursuance of a plan whereby, for all underlying five per cent. bonds now outstanding, that may be acquired and surrendered to applicant, on or before July 1, 1918, the trustee may deliver a like amount of First Lien and Refunding Mortgage Bonds and, in addition, the applicant may, at its option, make a cash payment of not exceeding \$70.00 for each underlying bond so surrendered, and such underlying four per cent. bonds as may be acquired and surrendered to applicant, on or before said date, may be taken up by the applicant company upon a five per cent. income basis, the trustee to exchange therefor a like par amount of said First Lien and Refunding Mortgage five per cent. Bonds against payment to the applicant at par and interest, less a discount at a rate of not exceeding \$70.00 for each \$1,000.00 bond; and it appearing to the Commission that the issue of said bonds is reasonably required for the discharge or lawful refunding of applicant's obligations, and for the construction, completion, extension and improvement of its facilities, and the maintenance and improvement of its service, the Commission is satisfied that its consent and authority for the issue of said bonds should be granted. It is, therefore,

Ordered, That said The Northern Ohio Traction and Light Company be, and it hereby is authorized to issue its First Lien and Refunding Mortgage five per cent. Bonds of the total principal sum of Fourteen Million and Seventy-five Thousand Dollars (\$14,-

075,000.00), and that Four Million Dollars (\$4,000,000.00), principal sum, of said bonds be sold for the highest price obtainable, but for not less than eighty-eight and one-half ($88\frac{1}{2}$) percentum of the par value thereof. It is further

Ordered, That \$10,075,000.00 principal sum, of said bonds be deposited with the trustee under said mortgage, in pursuance of the plan whereby for all underlying five per cent. bonds now outstanding, that may be acquired and surrendered to the applicant on or before July 1, 1918, there may be delivered by the trustee a like amount of First Lien and Refunding Mortgage Bonds and, in addition, the applicant company may, at its option, make a cash payment of not exceeding \$70.00 for each underlying bond so surrendered and, such underlying four per cent. bonds as may be acquired and surrendered to the applicant on or before said date may be taken up by the applicant upon a five per cent. income basis the trustee to exchange therefor a like par amount of said First Lien and Refunding Mortgage five per cent. Bonds against payment to the applicant at par and interest, less a discount at the rate of not exceeding \$70.00 for each \$1,000.00 bond. It is further

Ordered, That in case of the failure by applicant to make such exchange for its underlying bonds, it be, and hereby is authorized, on or before July first, 1918, to sell said bonds for the highest price obtainable, but for not less than ninety-three (93) percentum of the par value thereof, and apply the proceeds thereof to the payment and discharge of said underlying bonds at par. It is further

Ordered, That the proceeds arising from the sale of the \$4,000,000.00 bonds, herein authorized to be sold, be devoted to and used for the following purposes, and no others, to-wit:

(a) The payment and discharge of the \$1,800,000.00, principal sum of six per cent. Collateral Trust Notes, now outstanding, of the issues of August 1, 1913, and July 1, 1915.

(b) The payment of the \$100,000.00 First Mortgage Bonds of the Tuscarawas Railroad Company, which matured June 1, 1916.

(c) The payment of the \$47,000.00 bonds of the Lake View Land and Improvement Company, which matured July 1, 1916.

(d) The balance of such proceeds to be applied to the payment for the additions, extensions and improvements to applicant's property and facilities, of the total estimated cost of \$2,019,000.00, as more fully set out in a detailed statement, as amended, marked "Exhibit B", attached to the application herein, which "Exhibit B" hereby is made a part of this order by reference. It is further

Ordered, That the \$51,000.00 discount arising from the sale of applicant's collateral trust notes of the principal sum of \$500,000.00, authorized July 27, 1915, by the order in proceeding No. 555 before this Commission, forthwith be charged to applicant's profit and loss or surplus account. It is further

Ordered, That the sum of \$126,480.00 (being discount capitalized under authority of the order of this Commission in said proceeding No. 555), forthwith be charged to surplus account and credited to applicant's road and equipment account. It is further

Ordered, That the \$51,000.00 discount arising from the sale of preferred capital stock under authority of the order of this Commission in proceeding No. 752, be charged to profit and loss account at the close of the present fiscal year. It is further

Ordered, That the discount and expense arising from and incident to the sale of the bonds herein authorized to be sold, and the discount and expense arising from and incident to the refunding of any of the \$10,075,000.00 outstanding prior lien obligations, be amortized pursuant to the provisions of the system of accounting adopted and prescribed by this Commission. It is further

Ordered, That the applicant's underlying securities, following: Held in escrow, \$3,100,000.00; deposited as collateral, \$2,300,000.00, and held in treasury, \$290,000.00, totalling the principal sum of \$5,690,000.00, be used for collateral purposes only and shall be cancelled and discharged at or before the date, or dates, of maturity thereof. It is further

60 Ordered, That the applicant credit to road and equipment account the following:

Discount on The Northern Ohio Traction and Light	
Company bonds, 1902-3-4	\$232,000.00
Discount on The Canton-Akron Consolidated Railway	
Company, bonds 1906	25,000.00
	<hr/>
	\$257,000.00

and charge the same to its surplus account. It is further

Ordered, That applicant make verified report to this Commission semi-annually, within thirty days after June thirtieth and December thirty-first, of each year, of the issue and disposition of the bonds herein authorized, the expenditure of the proceeds of such bonds as are sold, the progress of the amortization of the discounts and expenses arising therefrom, the Cancellation or destruction of retired securities, and compliance with the other requirements of this order.

THE PUBLIC UTILITIES COMMISSION OF OHIO.

BEECHER W. WALTERMIRE,
Chairman;

LAWRENCE K. LANGDON,
LOUIS M. DAY,

Commissioners.

Dated at Columbus, Ohio, This twenty-first day of July, 1916.

A true copy:

_____,
Secretary.

61 District Court of the United States, Northern District of Ohio
Eastern Division.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
against

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY and THE
NORTHERN OHIO POWER COMPANY, Defendants.

Amendment to Bill.

Now comes the plaintiff above named and amends its bill of complaint heretofore filed herein in the following particulars, to-wit:

First. By adding at the end of paragraph Tenth of said bill the following:

"As appears from said Exhibit B, the consideration paid by said Traction Company for said property, rights, and franchises of said Northern Ohio Power Company was the cancellation of an indebtedness due by said Power Company to said Traction Company for moneys advanced by said Traction Company for the purpose, among other things, of constructing the dam and power plants hereinafter in paragraph Twelfth more particularly described.

62 "Prior to said last mentioned purchase and sale and on or about February 2, 1912, said Traction Company applied to the Public Service Commission of Ohio (the predecessor of said Public Utilities Commission of Ohio) for authority to issue its cumulative preferred stock of the par value of \$2,000,000, the proceeds to be used in part in the acquisition and construction of said dam and power plants hereinafter in paragraph Twelfth more particularly described; and upon said application said Public Service Commission on or about April 23, 1912, made an order a copy of which is hereto annexed marked Exhibit E and hereby made part of this bill. The property, construction and facilities set out in the exhibits referred to in said order, Exhibit E, include and largely consists of the dam and power plants hereinafter in paragraph Twelfth more particularly described. Subsequent to the making of said order, and under color of authority thereof, said Traction Company issued the securities mentioned therein and the proceeds thereof were largely, if not wholly, used by said Traction Company in the acquisition and construction of said dam and power plants as herein set forth; and the defendants assert and claim the orders of said Public Service Commission and said Public Utilities Commission hereinabove mentioned as authority for the acquisition, construction and use of said dam and power plants by them as herein set forth.

"Said orders Exhibits C and E give the color, form, and appearance of State authority for the acquisition of the parcels of land hereinabove mentioned, the construction of said dam and power plants, and the use thereof by the defendants, as herein set forth,

63 despite the prior grant and franchise of the plaintiff; and said orders are unconstitutional and void because authorizing an impairment of the plaintiff's contract and a taking of its property without due process of law."

Second. By changing paragraph 3 of the prayer of said bill so as to read as follows:

"That the various acts and proceedings hereinabove complained of as violating the plaintiff's rights under the Constitution of Ohio and the Constitution of the United States and the amendments thereof, and the statutes and laws under color of which the defendants are doing said acts and taking said proceedings, including particularly each and all the orders of the Public Service Commission and Public Utilities Commission of the State of Ohio herein set forth, be adjudged and declared unconstitutional and void because resulting in an impairment of the obligations of the plaintiff's said contracts with the State and a taking of the plaintiff's property without due process of law."

THE CUYAHOGA RIVER
POWER COMPANY,
By CARROLL G. WALTER,
Its Solicitor.

64 EXHIBIT E.

134.

In the Matter of the Application of THE NORTHERN OHIO TRACTION AND LIGHT COMPANY for Authority to Issue \$2,000,000.00, par Value, Cumulative Preferred Capital Stock. Approved April 23, 1912.

Finding and Order.

The Northern Ohio Traction and Light Company, a corporation incorporated and organized under the laws of Ohio, having, on the second day of February, 1912, filed its petition for authority to issue its cumulative preferred capital stock of the par value of two million dollars, the proceeds to be used for the acquisition of property, and construction completion, extension and improvement of its facilities as fully set out in exhibits "A," "B," "C" and "D" attached to said petition, and the hearing of said matter having been fixed for February 19, 1912, at 2 o'clock p. m., and having been heard in part on said day, and the further hearing thereof having been continued from day to day, and said company having, on the 8th day of March, 1912, filed its amended petition reducing the amount to be expended for the purposes therein set out from two million nine hundred and eleven thousand six hundred and twenty-eight dollars and two cents to two million thirty-nine thousand six hundred and twenty dollars, said matter came on this day for final hearing
65 upon the amended petition, the evidence and the exhibits.

After considering the pleadings, hearing the evidence, ex-

amining the exhibits, listening to the arguments of counsel and making such further inquiry and investigation as the Commission deemed proper, and it appearing that the improvements, extensions and betterments, contemplated by the petitioner as fully set out in said exhibits, are proper and necessary for the maintenance and extension of petitioner's service, and that the whole and each and every part thereof should be made, the Commission is satisfied that a portion of the necessary expenditures in making said improvements, extensions and betterments to its property should be raised by the sale of its said cumulative preferred capital stock. It is, therefore,

Ordered, That The Northern Ohio Traction and Light Company be and it hereby is authorized to sell its cumulative preferred capital stock of the par value of one million six hundred and forty thousand dollars (\$1,640,000.00), and that said stock be sold for the best price obtainable and at not less than the par value thereof, it being the opinion and finding of the Commission that the money to be secured from the sale of said cumulative preferred capital stock is reasonably required for the proper purposes of said corporation. It is further

Ordered, That the said Northern Ohio Traction and Light Company devote not less than three hundred and sixty thousand 66 (\$360,000.00) in addition to the amounts raised by the sale of its said cumulative preferred capital stock, to the acquisition of property and the making of improvements, extensions and betterments, as set out in said petition and the exhibits attached thereto, and that said sum of three hundred and sixty thousand dollars be secured and obtained either from an assessment upon the holders of the common stock of said company, or that said sum be taken from the surplus earnings of said company which otherwise, except for the provisions of this order, would be devoted to the payment of dividends upon said common stock. It is further

Ordered, That upon the completion of the power plants now under construction and to be constructed by said company, as set out in said petition and the exhibits, attached thereto, that the original cost of the power plant now in use, amounting to the sum of three hundred and twenty-two thousand dollars (\$322,000.00), be deducted from the capital obligations of said company by the redemption of bonds of the par value of three hundred and twenty-two thousand dollars, due and payable at the time said new power plants are completed or that, if no such bonds are due and payable at said time, that said sum of three hundred and twenty-two thousand dollars be set aside and devoted to the redemption of said bonds of the par value of three hundred and twenty-two thousand dollars when the same shall fall due and become payable. It is further

Ordered, That the proceeds arising from the sale of said cumulative preferred capital stock of the par value of one million 67 six hundred and forty thousand dollars and said sum of three hundred and sixty thousand dollars obtained from an assessment upon the holders of the common stock of said company or taken from the surplus earnings of said company which otherwise would be used in the payment of dividends upon

said common stock, be devoted by the said The Northern Ohio Traction and Light Company to the following purposes, and no other, to-wit:

For the construction and equipment of a power plant	\$1,500,000.00
For double tracking the Akron, Bedford and Cleveland Division of interurban railway between Chittenden's station and Fell's station, and between the northerly limits of Bedford and the southerly limits of Newburg, in all a distance of ten and one-tenth miles...	410,000.00
For the construction of car barns and the construction and equipment of car shops in South Akron.....	250,000.00
For the purchase of thirty-five city cars, fifteen interurban cars and two derrick cars.....	350,000.00
	<hr/>
	\$2,510,000.00

Less amounts credited as follows:

Amount expended on power plant to December 31, 1911.....	\$320,380.00
68 The abandonment of seven and one-half miles of single track on the Akron, Bedford and Cleveland Division now located on public highway and to be charged from income	150,000.00
	<hr/>
	470,380.00

Total expenditure for the acquisition of property, improvements, extensions and betterments under this order.....	\$2,039,620.00
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It is further

Ordered, That the said The Northern Ohio Traction and Light Company *made* verified report to the Commission as follows: Upon the sale of said cumulative preferred capital stock, or any part thereof, the fact of such sale and the amounts realized therefrom, which shall be the largest amounts obtainable and shall not be less than the par value of said stock; at the termination of each and every period of six (6) months from the date of this order, the disposition and use made of the proceeds of the sale of said stock of said company, and use made of the amount obtained from an assessment upon the holders of the common stock of said company or from the surplus earnings of said company as herein set out, setting forth in

69 reasonable detail the purposes to which said sums of money have been divided, and that such report be made until all the proceeds of the sale of said stock and the amount obtained from an assessment upon the holders of the common stock or taken from the surplus earnings of said company have been expended pursuant to this order. It is further

Ordered, That when the said power plants now under construction and to be constructed, as set out in said exhibits, are completed that said fact be reported to the Commission, together with a report of the action of said company in reducing its capital obligations by reason thereof, as herein required. It is further

Ordered, That all the provisions of this order and all the parts thereof be considered interdependent and not separable at the option of said company.

70

Motion to Dismiss the Bill.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 366.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,

against

THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE
NORTHERN OHIO POWER COMPANY, Defendants.

Motion to Dismiss.

Defendants severally move to dismiss the bill of complaint for the following reasons appearing on the face thereof:

(1) Want of jurisdiction in this Court in that the matter in controversy does not arise under the Constitution or laws of the United States.

(2) The bill does not state facts sufficient to constitute a valid cause of action in equity against the defendants or either of them.

(3) Plaintiff has a plain, adequate and complete remedy at law.

MATHER & NESBIT,
TOLLES, HOGSETT, GINN & MORLEY,
Solicitors for Defendants.

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Opinion by Killits, District Judge.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 366. Equity.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,

vs.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE
NORTHERN OHIO POWER COMPANY, Defendants.

Memorandum.

KILLITS, J.:

The court is hearing a motion to dismiss the bill herein for the reason that the facts therein set up do not entitle the plaintiff to the equitable relief demanded. This is the fourth case in this court involving more or less all the facts attempted to be pleaded in the complaint (Cuyahoga River Power Company v. City of Akron, 210 Fed. 524; 240 U. S. 462; John H. Sears, trustee v. City of Akron and John H. Sears v. Northern Ohio Traction & Light Company, and The Northern Ohio Power Company, numbers 319 and 344, respectively, on the dockets of this court. See, also, C. R. P. C. v. N. R. Co., 244 U. S. 30). It seems unnecessary that we should further extend the litigious literature involving complainant's claims by any other statement of facts now than one necessary to the point to which it seems to us the issues here are narrowed, and upon which the motion should be considered.

The complainant was organized as a corporation in 1908, to develop hydro-electric power upon the Cuyahoga River and to sell and distribute the same to consumers. Its plan involved utilization of the river and its branches in seven or more counties of Ohio, to occupy with its dams and power properties a hundred square miles of territory in a populous part of the state. The scheme was manifestly exceedingly ambitious; one, if carried out, of very great importance to the public, involving the expenditure ultimately of millions of dollars. The interest of the public in the utilization of the natural forces here as fast as they may be employed is a consideration which is of much influence in the determination of the present equities of the complainant and the regard in which its present demands must be held. The principal defendant, The Northern Ohio Traction & Light Company, is a public utility whose corporate rights, to be exercised in some important instances at least in the territory covered by the paper scheme of the complainant, were acquired some years earlier than the date of the incorporation of the complainant. This defendant operates an important electric railway line depending for its power upon electricity which may in part be generated by the employment of the water power which the flow of the Cuyahoga River creates within the limits of complainant's

scheme. While much criticism is offered in the complaint of the manner in which the defendant just named acquired its title to certain riparian tracts which are the specific sites involved in the present controversy, in our judgment there is nothing stated which materially affects that title as a title in fee, nor is there anything stated other than the claims insisted upon by the complainant which militates against the right of the defendant named to use the lands involved in this controversy as that defendant is now using them, namely, for the purpose of employing the water power existent upon them for hydro-electric purposes and as the site of an electric producing plant.

73 The parcels of land involved here, three in number but as we understand the complaint, contiguous to each other, involve the bed and banks of the Cuyahoga River at the lower end of complainant's proposed improvement, and as alleged, and of course conceded by the motion, are so situate that complainant's proposed improvement cannot be entirely completed, without their appropriation. Shortly subsequent to the incorporation of complainant, a specific and detailed plan for the development of hydro-electric power, particularly describing, among others, lands here involved, was adopted and the improvement located by a resolution declaring the lands necessary and essential to carry out the purposes of the organization, but the complaint does not state that effective steps have been taken to secure to the owners of the properties involved in this action compensation for the appropriation of these parcels.

Until 1914, the improvements upon the parcels now owned by the Traction Company were of minor importance, but in that year the defendant named erected thereon dams and substantial buildings involving very large expenditures, by means of which is generated electric power for the operation of the Traction Company's Railroad from Cleveland to Akron and extended points, and of certain street railroads by it controlled. In 1916, this action was brought for the purpose of enjoining the Traction Company from using these improvements upon the theory that their continued use works to impair what the complainant terms a contract enjoyed by it with the State of Ohio because of its incorporation. So far it does not appear that the complainant has done much for the public by way of improving the water power of the river and its tributaries as provided by its

74 charter and particularly it does not appear that it has taken any steps in the way of improvement near the properties of the defendant Traction Company particularly described in the complaint, or that any of its operations are interfered with in any practical way by defendant's use of its property.

The contention of the plaintiff is that by virtue of its charter, it has appropriated the potentialities of the river and its tributaries within the boundaries by it designated in its resolution of improvement, and that it is entitled, because of its incorporation under the general laws of the State, to exclude any use of the water power of these streams of the nature of the use which it anticipates enjoying in the future while it proceeds, however, dilatorily, to make its improvements in detail and to complete its ambitious scheme. In brief, its proposition is that its charter is equivalent to a contract with the

State of Ohio giving it the exclusive right to the employment of the benefits which nature has conferred upon the public through the forces of these streams to the end that, until it finds itself able to completely occupy all the territory which it has privately designated to be necessary for its use, the public shall not have the advantage of any portion not immediately occupied by it through the employment of the resources thereof by another public utility company.

This is the controlling question of this case and we approach its solution as proposed by the motion to dismiss with the thought that we have to consider that the matter of public convenience is a large criterion in a determination of just what equities are enjoyed by the complainant.

Passing the speculation as to what the complainant might be able to do hereafter in the act of developing its whole scheme by ousting the Traction Company from its property and depriving the defendant of the use of the water power now enjoyed by it through appropriation proceedings, upon which proposition we venture no

75 opinion whatever, it seems to us very clearly that it is against public policy to accede to complainant's views of its immediate rights and to say without complainant that its charter gives it a right to prevent any land owner within the territory which it has determined to eventually occupy to use his lands in any proper way for public or private purposes, in the absence of a specific acquirement by the complainant through completed condemnation proceedings with compensation paid or secured of those lands. Whatever may be the fact in other jurisdictions depending upon provisions of other constitutions or laws or the constructions thereof by their courts, it is thought by this court that in Ohio the mere charter of a company for the utilization of natural resources for the public benefit does not constitute a definite and excluding contract for the use of such resources; that in the words of some of the argument here, the complainant acquired nothing more through its charter than a potentiality which amplifies into an actual exclusive possession only as it complies with the conditions of the laws of the State to the completion of appropriation proceedings. We concur therefore in the views of this subject expressed by Judge Clarke in the two Sears cases above referred to in his opinions on file in this court in those cases respectively. It is not true in Ohio that the character of complainant gave to it "a vested right seemingly unlimited in time to exclude the rest of the world from its water sheds it chose" simply by declaring by resolution just what territory it hoped in the future to occupy to carry out its purposes. The terms of Section 19, Art. 1, of the Ohio Constitution militates against plaintiff's claim. Until appropriation is completed as provided by the condemnation laws of the State, the Traction Company's right to dominion over its

76 holding is inviolate. *Wagner v. Railway Co.*, 38 O. S. 32. Public convenience entitles the public to the employment of these natural resources as rapidly as demand therefor accrues, not according to the ability of the complainant to put them into public use. Should complainant find in time that it has attempted a larger

scheme than it can execute, it is privileged by the law of the State (General Code, Section 11060) to abandon any portion of its plan. The reciprocal proposition must be true that until it actually acquires a right to use any specific property involved in its general plan, the benefits of the natural resources of that parcel may be given to the public by others if that may be done without interference with what the complainant is already doing. *Ramapo Water Co. vs. New York* 236 U. S. 579.

It is not necessary to determine to grant this motion, whether or not complainant has an adequate remedy at law. It may be that the Traction Company's occupancy of its own properties for the purposes complained of is subordinate to the rights of the complainant, under its charter, but if so, that subordination does not exist until the complainant has completed the steps required by law by which only it has acquired the dominant and exclusive interest. Conceding, without deciding, that it may hereafter so subordinate the rights of the Traction Company to its own right, and, by enforcing the latter, to exclude the Traction Company from its present use of the water power and privileges generated on the latter's own property, pending that time we see no reason why the State of Ohio might not permit the Traction Company to convey through the improvement of its own property to the public the favors which nature has there provided.

There seems to us a clear distinction between the facts of this case and cases of the class of the *Binghampton Bridge*, 3 Wall. 51, and *Hamilton, G. & C. Traction Company v. Hamilton & L. Elec. Transit Co.*, 69 O. S. 402. These cases are to be distinguished from the instant case by the fact that in them the question is one of actual and present interference with rights of the corporation in the operative enjoyment of the privileges of its charter.

We are compelled to conclude that there is no equity in complainant's contention respecting the effect of its charter.

The dictation of this memorandum was just concluded when the postman delivered the official copy of the opinion of the Supreme Court, delivered March 4, 1918, affirming the judgment of this court in *Sears v. City of Akron*, above referred to. It would have been sufficient, we think to have made a less extended disposition of the motion here upon the authority of that decision, for therein the principal and controlling contention here offered by the complainant is effectively denied by these words from the opinion of Mr. Justice Brandeis:

"The so-called charter simply conferred upon the company the power to take lands necessary for and to construct thereon, the dams, locks and other parts of its plant. If by purchase or by right of eminent domain under the charter powers, the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may otherwise acquire from the owners specific rights in the use and flow of the water. But these would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter."

The motion to dismiss is allowed to each defendant.

JOHN M. KILLITS,
District Judge.

March 15, 1918.

78 [Endorsed:] No. 366. United States District Court, Northern District of Ohio, Eastern Division. The Cuyahoga River Power Company, vs. The Northern Ohio Traction & Light Company and The Northern Ohio Power Company. Copy of Memorandum. Filed March 15, 1918. B. C. Miller, Clerk.

79 *Decree Appealed From.*

At a Stated Term of the District Court of the United States for the Northern District of Ohio, Eastern Division, held in and for said District, at the Court House thereof, on the — day of March, 1918.

Present: Hon. John M. Killits, District Judge.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
against

THE NORTHERN OHIO TRACTION AND LIGHT CO. and the NORTHERN OHIO POWER COMPANY, Defendants.

This cause came on to be heard upon the bill of complaint and amendment thereto and the motion of the defendants to dismiss the same, and was argued by counsel. Thereupon, upon consideration thereof, it is:

Ordered, Adjudged and Decreed, that for the reasons stated in the opinion of the Court filed herein on March 15, 1918, said bill of complaint be and the same hereby is dismissed.

Enter,

JOHN M. KILLITS,
U. S. D. J.

(Filed March 23, 1918.)

80 *Petition for and Allowance of Appeal.*

District Court of the United States, Northern District of Ohio,
Eastern Division.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
against

THE NORTHERN OHIO TRACTION AND LIGHT CO. and the NORTHERN OHIO POWER COMPANY, Defendants.

The above named plaintiff, feeling itself aggrieved by the decree entered herein on the — day of March, 1918, dismissing the bill of complaint herein, does hereby appeal from said decree to the Su-

preme Court of the United States and prays that its appeal may be allowed, and that a citation may issue directed to the defendants above named, and that a duly authenticated transcript of the record and proceedings upon which said decree was made may be transmitted to said Supreme Court of the United States.

Dated March —, 1918.

CARROLL G. WALTER,
Solicitor for Plaintiff.

Now on this — day of March, 1918, it is

Ordered that the foregoing petition for appeal be and it hereby is allowed, and that a citation be issued as prayed for, and that the Clerk certify the records and proceedings according to the prayer of said petition, bond to be given in the sum of \$250.00.

JOHN M. KILLITS,
United States District Judge.

(Filed March 23, 1918.)

81

Assignment of Errors.

District Court of the United States, Northern District of Ohio,
Eastern Division.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
against

THE NORTHERN OHIO TRACTION AND LIGHT CO. and the NORTHERN
OHIO POWER COMPANY, Defendants.

Now comes the plaintiff above named and presents with its accompanying petition for appeal from the decree entered herein on the 23rd day of March, 1918, dismissing the bill of complaint herein, the following assignment of errors, upon which it will rely upon its appeal from said decree, to-wit:

1. The Court erred in granting the defendants' motion to dismiss the bill of complaint.

2. The Court erred in refusing to hold that by its incorporation a contract was duly made and entered into between the State of Ohio and plaintiff, wherein and whereby said state duly granted to the plaintiff a right-of-way over and along the Cuyahoga River between the termini mentioned in the plaintiff's certificate of incorporation, and a vested right and franchise to construct, maintain and operate, within the limits of said right-of-way, a hydro-electric plant for the development of electrical current and energy from the waters of said river, together with the right or franchise of exercising the state's power of eminent domain in order to appropriate and acquire all property necessary to carry out and perform said grant, and make the same effective.

82

3. The Court erred in refusing to hold that by its resolutions set forth in the complaint, the plaintiff definitely located its proposed

improvements upon specifically described parcels of land, and by such location acquired a prior and exclusive right to take, occupy and use the lands and waters covered by said location for the purposes expressed in the plaintiff's charter, and that such right is a contract right and a right of property, the title, possession, use and enjoyment of which are protected from impairment or deprivation by Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment to said Constitution.

4. The Court erred in refusing to hold that the acts and proceedings of the defendants set forth in the bill and the orders of the Public Service Commission of Ohio and Public Utilities Commission of Ohio, set forth in the bill, constitute an impairment of the obligation of the contract, grant, and franchise of the plaintiff, in violation of Section 10 of Article I of the Constitution of the United States, and a taking and deprivation of the property of the plaintiff in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. The Court erred in refusing to hold that the claims and assertions of the defendants, with respect to the character and effect of their acquisition and use of the parcels of land and water rights set forth in the bill, and with respect to the right of the plaintiff to condemn or appropriate said lands and water rights, constitute a cloud upon the plaintiff's title to its said contract, grant and franchise, and that by reason of said claims and assertions being
83 made under an assertion of power from the State and under color of authority of State laws, the placing of said cloud upon the plaintiff's title constitutes an impairment of its contract and a taking of its property in violation of Section 10 of Article I of the Constitution of the United States and of the due process clause of the Fourteenth Amendment thereto.

6. The Court erred in refusing to hold that the plaintiff had, and has, all the rights, titles, privileges, powers and franchises set forth in the bill, and in refusing to hold that the acts and proceedings of the defendants complained of in the bill constitute such a material interference with the plaintiff's title, possession, use and enjoyment of said rights, titles, privileges, powers and franchises as entitles the plaintiff to the equitable relief prayed for in the bill.

7. The Court erred in holding that any of the corporate rights of the defendant, the Northern Ohio Traction and Light Company, the exercise of which is complained of in the bill, were acquired earlier than the date of the incorporation of the plaintiff.

8. The Court erred in holding that in Ohio the mere charter of a company for the utilization of natural resources for the public benefit, does not constitute a definite and excluding contract for the use of such resources.

9. The Court erred in holding that under the law of Ohio the plaintiff is privileged to abandon any portion of its corporate franchises at will.

10. The Court erred in refusing to hold that upon the facts alleged in the bill, the plaintiff was entitled to relief.

84 Wherefore, and for various other reasons, the said plaintiff prays that the said decree may be reversed and that the District Court of the United States for the Northern District of Ohio, Eastern Division, be directed by the mandate of the Supreme Court of the United States, to enter a decree denying the defendants' motion to dismiss the bill, and adjudging that the bill sets forth a valid cause of action in equity, arising under the constitution of the United States; and for such other, further and general relief, as to the Court may seem proper.

Dated March —, 1918.

CARROLL G. WALTER,
Solicitor for Plaintiff.

(Filed March 23, 1918.)

85

Citation.

UNITED STATES OF AMERICA, *ss:*

To The Northern Ohio Traction and Light Co. and The Northern Ohio Power Company:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Ohio, Eastern Division, wherein the Cuyahoga River Power Company is appellant, and you are appellees, to show cause, if any there be, why the decree in said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 23rd day of March, in the year of our Lord one thousand, nine hundred and eighteen.

JOHN M. KILLITS,
United States District Judge.

Service of the foregoing citation, together with a copy of the petition for, and an allowance of the appeal therein referred to, and the assignment of errors accompanying the same, is hereby admitted this 3rd day of April, 1918.

TOLLES, HOGSETT, GINN & MORLEY,
MATHER AND NESBITT,
Solicitors for Defendants.

Filed Mar. 23, 1918, at — o'clock — M. B. C. Miller, Clerk U. S. District Court, N. D. O.

86 [Endorsed:] District Court of the United States for the Northern District of Ohio, Eastern Division. The Cuyahoga River Power Company, Plaintiff, against The Northern Ohio Traction and Light Company and The Northern Ohio Power Company, Defendants. Citation.

87 *Stipulation as to Record.*

District Court of the United States, Northern District of Ohio,
Eastern Division.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
against

THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE
NORTHERN OHIO POWER COMPANY, Defendants.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled suit as agreed on by the parties.

Dated April 3, 1918.

CARROLL G. WALTER,
Solicitor for Plaintiff.
TOLLES, HOGSETT, GINN & MORLEY,
MATHER & NESBITT,
Solicitors for Defendants.

88 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, ss:

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
against

THE NORTHERN OHIO TRACTION & LIGHT COMPANY and THE
NORTHERN OHIO POWER COMPANY, Defendants.

NORTHERN DISTRICT OF OHIO, ss:

I, B. C. Miller, Clerk of the United States District Court, within and for said District, do hereby certify that the foregoing is a full, true and correct transcript of the final record in the above entitled cause, in accordance with the stipulation of the parties herein.

There is also annexed to and transmitted with such record, the original citation issued and allowed in this cause.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court at Cleveland in said District, this 20"

day of April, A. D. 1918, and in the 142nd year of the Independence of the United States of America.

[Seal of the District Court, Northern District of Ohio.]

B. C. MILLER,

Clerk,

By A. H. ELLIOTT,

Deputy Clerk.

Endorsed on cover: File No. 26,479. N. Ohio D. C. U. S. Term No. 102. The Cuyahoga River Power Company, appellant, vs. The Northern Ohio Traction and Light Company and The Northern Ohio Power Company. Filed May 1st, 1918. File No. 26,479.



Office Supreme Court, U. S.
FILED

MAY 16 1918

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1917

No.

483102

THE CUYAHOGA RIVER POWER COMPANY,

Appellant.

against

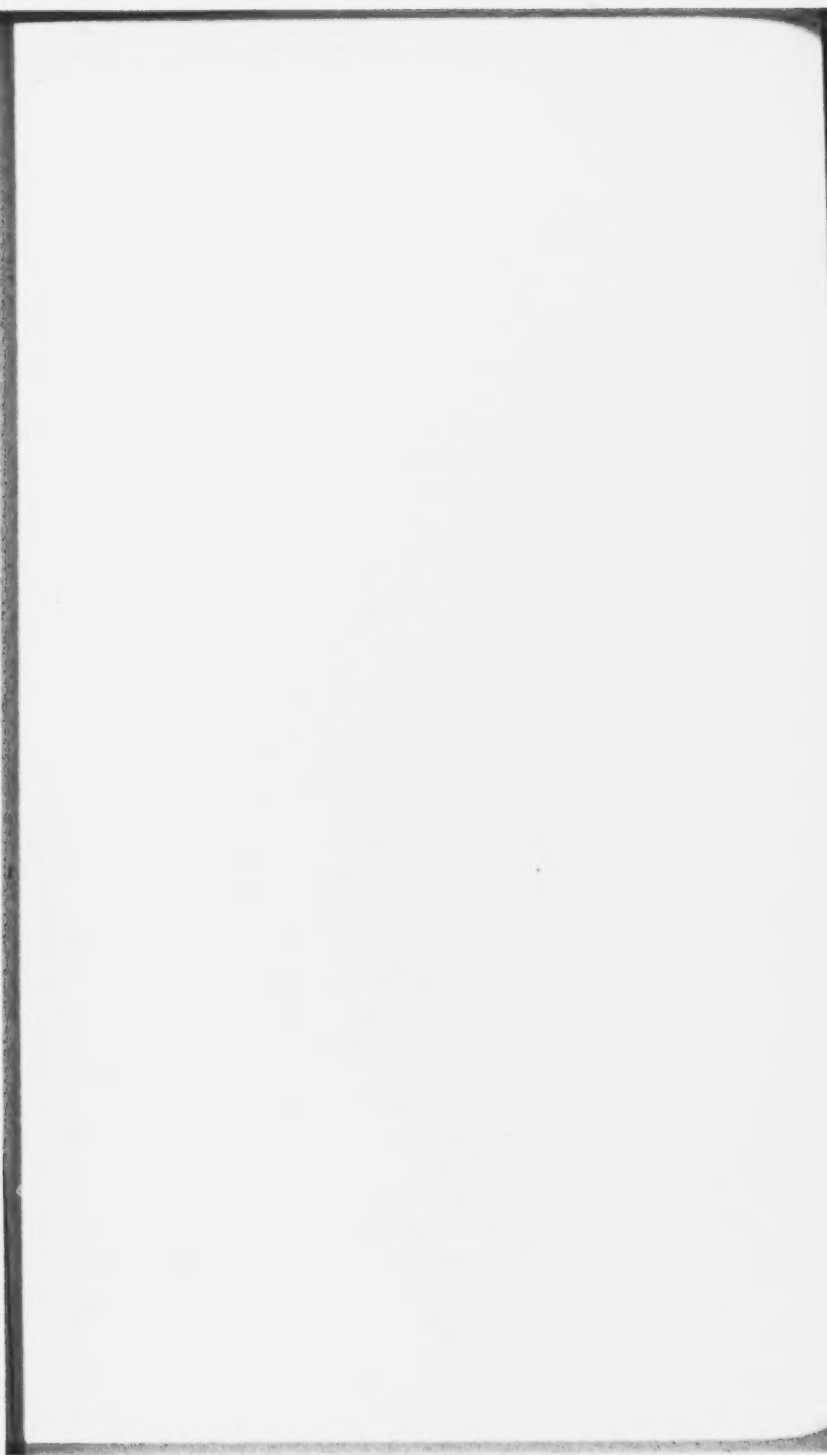
THE NORTHERN OHIO TRACTION AND LIGHT
COMPANY and THE NORTHERN OHIO POWER
COMPANY,

Appellees.

Appeal from the District Court of the United States for
the Northern District of Ohio, Eastern Division

MOTION TO ADVANCE

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Appellant.



Supreme Court of the United States,

OCTOBER TERM—1917.

THE CUYAHOGA RIVER POWER
COMPANY,

Appellant,

against

THE NORTHERN OHIO TRACTION
AND LIGHT COMPANY and THE
NORTHERN OHIO POWER COM-
PANY,

Appellees.

No. 1012.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

Motion to Advance.

Now comes the above named appellant and moves the court to advance this cause and set the same down for argument as soon after the opening of the next term as may be convenient.

The following is a brief statement of the facts and matter involved and of the reasons for the application:

The appeal is from a decree dismissing a bill in equity pursuant to the granting of a motion to dismiss on the ground that the bill failed to state

facts sufficient to constitute a valid cause of action in equity.

This is the *fourth* case which has come to this court involving a consideration of the rights of the present appellant (See *Cuyahoga River Power Co. v. Akron*, 240 U. S., 462; *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S., 300; *Sears v. Akron*, decided March 4, 1918).

Broadly speaking, the appeal presents the federal questions which we claimed were involved and which were argued in *Cuyahoga River Power Co. v. Northern Realty Co.*, *supra*, but which this court then declined to consider because it was of the opinion that the failure of the record to show that the judgment there sought to be reviewed rested upon the federal questions rather than upon the state questions deprived this court of jurisdiction. More specifically, the appeal presents the questions whether the incorporation of the appellant and its adoption of its location gave to the appellant a contract and property right, as against third persons, to the lands and waters covered by its charter and location—a question which, as we understand it, was expressly left open by this court in its opinion in *Sears v. Akron*, *supra*—and whether that right has been unconstitutionally impaired and taken.

The present suit was commenced in August, 1916. Owing to the then-existing and long-continued vacancy in the judgeship of the district and the subsequent appointment of Judge WESTENHAVER, who was disqualified because of his prior association as counsel for the appellant, a hearing upon the defendants' motion to dismiss was not obtainable until June, 1917, when the same was argued before and submitted to Judge KILLITS.

No decision upon the motion was rendered until March, 1918. An appeal was immediately taken and docketed in this court.

In view of the fact that the appellant already has suffered unusual delay in obtaining a decision upon the sufficiency of its bill, in view of the fact that the important and controlling questions have been heretofore argued before this court in other cases without any decision upon them being obtained, and in view of the further fact that progress upon an important enterprise which will be of great benefit to the public, both as a conservancy measure and as affording cheap power without the use of coal, necessarily awaits a determination of the pending litigation, it is respectfully submitted that special and peculiar circumstances exist which warrant a hearing of this cause out of its usual order upon the docket. For these reasons an advancement of the case is hereby prayed.

Respectfully submitted,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Appellant.

Notice of motion to advance.

Sirs:

Please take notice that the appellant, The Cuyahoga River Power Company, will submit the foregoing motion to advance to the Supreme Court of the United States at a Stated Term thereof on Monday, June 3, 1918, at the Capitol in the City

of Washington, D. C., at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated, May 9, 1918.

Yours, etc.,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Appellant.

, To

S. H. TOLLES, Esq.,
Counsel for Appellees,
Williamson Building,
Cleveland, Ohio.

FILED
NOV 14 1919

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

October Term, 1919

No. 102

THE CUYAHOGA RIVER POWER COMPANY

Appellant

against

THE NORTHERN OHIO TRACTION AND LIGHT COM-
PANY and THE NORTHERN OHIO POWER COMPANY

Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRIEF FOR APPELLANT

WILLIAM Z. DAVIS

Columbus, O.

JOHN L. WELLS

CARROLL G. WALTER } New York

Counsel for Appellant



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Supreme Court of the United States

OCTOBER TERM, 1919

THE CUYAHOGA RIVER POWER
COMPANY,

Appellant,

against

THE NORTHERN OHIO TRACTION
AND LIGHT COMPANY and THE
NORTHERN OHIO POWER COM-
PANY,

Appellees.

No. 102.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

BRIEF FOR APPELLANT

Statement of the Case

This is a bill in equity, brought by the appellant in August, 1916, to enjoin the defendants, acting under color of authority of State laws and under an assertion of power from the State, from a continuous interference with certain franchises and other property rights previously granted to the appellant by the State. A motion to dismiss, amounting practically to a demurrer for want of equity, was granted by the Court below, and be-

cause of constitutional questions the case is brought here on direct appeal under Section 238 of the Judicial Code.

Facts

The plaintiff was chartered under the laws of Ohio to build and maintain a system of dams, canals, and locks in the Big Cuyahoga River for the generation of electricity for light, heat and other purposes. Its charter confers authority to acquire by condemnation or purchase the lands necessary for, and to construct thereon, the dams, locks and other parts of its plant (Record, pp. 1, 2; 240 U. S., 462, 463; 244 U. S., 300, 301; 246 U. S., 242, 248).

By resolution of its board of directors, it adopted, after its incorporation, a specific and detailed plan for the development of hydro-electric power from the waters of the river and the sale of the same to the public, and entered upon and surveyed the lands necessary to carry out the plan and resolved and determined to acquire them (Bill, Par. Fifth, and Exhibit A; Rec. pp. 2, 16-23).

Among the necessary lands so entered upon and surveyed by the plaintiff, and included in its plan and resolution, are three parcels described in the bill as *Everett Parcel*, *Sackett Parcel* and *A B & C Parcel*, which constitute a part of the bed and banks of the river and are so situated that the improvement provided for in the plaintiff's charter and plan cannot be constructed without a taking thereof by the plaintiff (Bill, Par. Sixth, Rec. pp. 2, 3). These parcels, at the time of the adoption of the plan and for long afterwards, were vacant and unimproved and unused, and neither the defendants herein nor any other person or

corporation (other than the plaintiff) had made any location of any proposed improvement or structure for utilizing them for the development of power, or had obtained any grant therefor from the State of Ohio (Bill, Par. Eleventh). The defendant Traction Company was asserting some interest in the *Everett parcel* by virtue of some agreement with Henry A. Everett, the record owner (Bill, Par. Sixth), but this assertion is expressly negatived in the bill (Par. Fifteenth), and Everett afterwards conveyed the land to a real estate concern by an absolute fee simple deed (Bill, Par. Eighth).

After the plaintiff had adopted its development plan and commenced condemnation proceedings for the acquisition of said Everett, Sackett and A B & C parcels, and other parcels of land needed by it for carrying out said plan, the defendant Northern Ohio Power Company was, or claims and purports to have been, incorporated under the same statute under which the plaintiff was incorporated, and for purposes similar to the plaintiff's purposes, by the filing of articles of incorporation which specify as the place for its improvement a site which conflicts with the location previously specified in the plaintiff's articles and plan and resolution (Bill, Par. Fourteenth).

Said defendant then purchased the Everett and Sackett parcels above mentioned (Bill, Par. Tenth), and utilized them in the construction of a small hydro-electric plant and a steam power plant that uses the waters of the river for the generation of steam (Bill, Par. Twelfth). It then sold those parcels, and all its other property, rights, and franchises, to the defendant Traction Company, which took possession thereof and is now using, in its street railway business, the power generated at the power plants so constructed upon

said parcels (Bill, Pars. Tenth, Fourteenth). The parcels were purchased, both by the defendant Power Company and the defendant Traction Company, and the power plants were constructed, with notice and actual knowledge of the plaintiff's charter and plan of development (Bill, Par. Thirteenth).

The sale by the defendant Power Company to the defendant Traction Company was made under color of and pursuant to authority claimed to have been conferred by certain orders of the Public Utilities and Public Service Commissions of Ohio which are annexed to the bill (Bill, Par. Tenth and Amendment, p. 32; Exhibits B, C, and E).

The defendant Traction Company was incorporated before the plaintiff, but not under the statute under which the plaintiff was incorporated nor for the purpose named in such statute; and its articles of incorporation do not set forth any *termini* of any proposed improvement as provided in Section 8625 of the Ohio Code; and its only right or franchise to construct or maintain the power plants erected upon the parcels of land here in question is that derived from its purchase of the property, rights, and franchises of the defendant Power Company (Bill, Pars. Fourteenth, Fifteenth, Sixteenth).

Nevertheless, the defendant Traction Company asserts and claims that the construction of said power plants and its use of the same constitutes a devotion of said parcels to a public use *and that for that reason said parcels cannot be taken or appropriated by the plaintiff* (Bill, Par. Seventeenth). It founds its claim upon State laws, *i. e.*, the incorporation of the defendant Power Company and the Commission orders set forth in the bill (*Idem*). And, acting upon such claim, it is

using and, unless enjoined, will continue to use, said parcels for itself and resist and deny the plaintiff's right to acquire or use them (*Idem*).

Quite obviously, the defendants' present use of the parcels for power-development purposes makes it impossible for the plaintiff to use them for the same purpose or otherwise proceed with its enterprise; and the defendants' assertion and claim that by reason of their own use the plaintiff has no right or power to acquire the land for its purposes constitutes a cloud upon the title of the plaintiff to its franchise and a continuous interference with such franchise (Bill, Par. Eighteenth, Nineteenth. See, also Par. Twentieth).

And as the plaintiff's franchise constitutes a contract and the defendants' interference therewith is grounded upon subsequent State laws, there is an impairment of the plaintiff's contract and a taking of its property without due process of law in violation of the contract and due process clauses of the Federal Constitution (Bill, Pars. Nineteenth, Twenty-second).

Decision Below. Specification of Errors.

The Court below dismissed the bill substantially upon the ground that the plaintiff had no rights. The opinion seems to have been profoundly influenced by the idea that inasmuch as the defendant Traction Company was already in possession and actually using the land for power-development purposes it would be rather uneconomical to put the defendant out in order to let the plaintiff come in (see passages at Record, pp. 38, 39, 40).

The legal principle upon which the decision rests is that the plaintiff's adoption of its plan of development and the location of its improve-

ment upon specifically described lands gave it no right to exclude rival companies from that location because Section 19 of Article I of the Ohio Constitution provides that a condemning corporation does not acquire title to the soil until the owner's compensation is assessed and paid (Rec. p. 39).

The first mentioned idea is sufficiently repudiated by *Denver v. Rio Grande R. R. Co. v. Arizona & Colorado R. R. Co.*, 233 U. S., 601, in which this Court, at the suit of a company which had simply located its line, ousted a completed railroad which had been constructed at a cost of \$800,000 and was actually in operation.*

With respect to the holding that Section 19 of Article I of the Ohio Constitution militates against the plaintiff's claim, it seems apparent that the Court below adopted the view so earnestly pressed by defendants' counsel that the suit in some way seeks to violate that provision by ousting the defendants from the possession of their "privately owned" lands and obtaining possession thereof for the plaintiff in advance of condemnation. We hence desire to emphasize at the outset that we make no claim of any right to oust the defendants from their possession, or of any right on the part of the plaintiff to take possession in advance of actual payment of compensation. The relief to which we insist the plaintiff is entitled in this suit is a decree establishing its title to its franchise, *i. e.*, establishing its right to proceed with its enterprise, and removing the cloud cast upon its title by the defendants' assertions and claims that the plaintiff's rights have been defeated by their own purchase and use of the land, by enjoining

* This information is obtained from the record and briefs in that case in this Court.

the defendants from using the land *for power-development purposes* and from asserting such use as a bar to the plaintiff's right to acquire the land by the orderly processes of condemnation.

The assignment of errors will be found at pages 42 to 44 of the Record. Those specially relied upon are the *third* to *seventh* inclusive, which are as follows:

“3. The Court erred in refusing to hold that by its resolutions set forth in the complaint, the plaintiff definitely located its proposed improvements upon specifically described parcels of land, and by such location acquired a prior and exclusive right to take, occupy and use the lands and waters covered by said location for the purposes expressed in the plaintiff's charter, and that such right is a contract right and a right of property, the title, possession, use and enjoyment of which are protected from impairment or deprivation by Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment to said Constitution.

“4. The Court erred in refusing to hold that the acts and proceedings of the defendants set forth in the bill and the orders of the Public Service Commission of Ohio and Public Utilities Commission of Ohio, set forth in the bill, constitute an impairment of the obligation of the contract, grant, and franchise of the plaintiff, in violation of Section 10 of Article I of the Constitution of the United States, and a taking and deprivation of the property of the plaintiff in violation of the due process clause

of the Fourteenth Amendment to the Constitution of the United States.

“5. The Court erred in refusing to hold that the claims and assertions of the defendants, with respect to the character and effect of their acquisition and use of the parcels of land and water rights set forth in the bill, and with respect to the right of the plaintiff to condemn or appropriate said lands and water rights, constitute a cloud upon the plaintiff’s title to its said contract, grant and franchise, and that by reason of said claims and assertions being made under an assertion of power from the State and under color of authority of State laws, the placing of said cloud upon the plaintiff’s title constitutes an impairment of its contract and a taking of its property in violation of Section 10 of Article I of the Constitution of the United States and of the due process clause of the Fourteenth Amendment thereto.

“6. The Court erred in refusing to hold that the plaintiff had, and has, all the rights, titles, privileges, powers and franchises set forth in the bill, and in refusing to hold that the acts and proceedings of the defendants complained of in the bill constitute such a material interference with the plaintiff’s title, possession, use and enjoyment of said rights, titles, privileges, powers and franchises as entitles the plaintiff to the equitable relief prayed for in the bill.

“7. The Court erred in holding that any of the corporate rights of the defendant, the Northern Ohio Traction and Light Company, the exercise of which is complained

of in the bill, were acquired earlier than the date of the incorporation of the plaintiff."

POINT I

The plaintiff has an indefeasible property right to proceed with its development according to the plan adopted by its board of directors, and a correlative right to exclude rival companies from the lands of its choice.

In *Sears v. Akron*, 246 U. S., 242, 248, this Court held that the contract right created by the incorporation of the plaintiff was not illegally impaired by an ordinance under which the City of Akron was diverting the waters of the Cuyahoga River because there was no contract by the State *with reference to the water rights*. "Incorporation" it said, "did not imply an agreement that the quantity of water available for development by the company would not be diminished. * * * The so-called charter simply conferred upon the company the power to take the lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant"; and the Act of 1911, under which the city proceeded, was treated as an amendment to the company's charter making its rights subject to those of the city (pp. 242, 248, 249).

But, as we understand the decision, in that case, the Court expressly left undecided the question here presented as to whether the plaintiff's adoption of its plan of development and its commencement of condemnation proceedings gave it a preferential right as against rival power companies or other municipalities where no exercise of the State's reserved power to amend or repeal is in-

volved. For in the opinion it was expressly stated, at page 250:

“Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan, or (b) when condemnation proceedings were begun. *Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider.* For it is clear that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken, *Adirondack Ry Co. v. New York State*, 176 U. S., 335; and the Act of 1911 and the ordinance were both passed before the company had acquired any property. Nor are we called upon to determine to what extent the commencement of the acquisition of needed property in preparation for the power development, or even actual commencement of construction, would have vested in the company the right to complete the development. For the property alleged to be now owned by the company was not acquired by it until after the city’s development had been practically completed; and no work of construction has ever been commenced by the company.”

In the case at bar, the defendants are not proceeding under any act of the Legislature which

may be treated as an amendment of the plaintiff's charter. There was a suggestion in argument below that the organization of the defendant Northern Ohio Power Company in some way operated as an exercise of the reserved power to amend or repeal the charter, but the suggestion is obviously untenable. The reserved power to repeal can be exercised only by the General Assembly—not by the act of individual incorporators attempting to accept an offer by the State which has been previously accepted by others (See, as decisive, *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S., 574, 582, 583, 584), and the settled rule is that such an attempt to obtain a grant which conflicts with one already made is itself null and void and *not* a nullification or repeal of the existing grant (10 Cyc., 226).

This case, therefore, squarely presents the question whether a public utility corporation which, by the adoption of plans, surveys, descriptions and resolutions of appropriation, definitely located its proposed improvement upon specifically described parcels of land (See, Bill, Par. Fifth, Rec. p. 2; Resolution, Ex. A, Rec. p. 16), thereby obtains a preferential right to those lands as against rival companies who seek to defeat the first location by purchasing the lands from the owners—in other words, whether or not, as against its rivals, the company is entitled to protection as soon as its location is complete. The question frequently has arisen before and it has been uniformly decided in the affirmative, even in jurisdictions where payment of compensation is a condition precedent to the acquisition of title as against the owner of the soil, and even where the rival company has sought to defeat the right of the first locator by purchasing the land from the private owner.

For secondary authorities see:

33 Cyc., 111, 127, 138, 139;
Lewis on Eminent Domain, Secs. 503,
 504;
Elliat on Railroads, Secs. 921, 927.

In the first mentioned it is said (pp. 138, 139):

"The institution of condemnation proceedings or acquisition of title to the property is not essential to a location, and where priority of right has been secured by priority of location it cannot be defeated by a rival company agreeing with the owners and purchasing the property, or instituting condemnation proceedings in advance of such proceedings by the company first completing its location, for while the location does not give title as against the land owner, it fixes the prior right as between companies to acquire such title."

In *Denver & Rio Grande R. R. Co. v. Arizona & Colorado R. R. Co.*, 233 U. S., 601, this Court affirmed a judgment enjoining the appellant company from interfering with the located line of the appellee, although, as appears from the record and briefs filed in this court, the appellant had purchased the land and constructed its road at a cost of over \$800,000 and the appellee, on the other hand, had done nothing more than locate its line. The court stated that it saw no sufficient reason

"for reversing the decision of the local Court that a company is entitled to protection as soon as its final location is complete."

In *Sioux City, etc., Co. v. Chicago, etc., Co.*, 27 Fed., 770, which is a frequently cited and uni-

formly approved case, the complainant had purchased the land from the owner and sought to prevent the defendant from acquiring it. The defendant showed however that it had located its line before the complainant purchased, and for that reason it was held to have a better right to the land. The opinion of Judge SHIRAS is peculiarly appropriate because of the view taken below that no rights are acquired until the title of the owner of the soil is acquired and paid for:

“On part of the complainant, it is argued that the conveyances to it give it the absolute title to the right of way, because, when they were executed, the defendant company *had not paid the damages to the owners of the land*; that payment is necessary, under the statutes of Iowa, to create a right in the railway company as against the owner of the land; and that until payment is made the owner’s control over his property is absolute, and he can convey the same, or a right of way over the same, to to any railway company. * * * *The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right and better equity.* The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the State, and *although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement.* The owner cannot, by conveying the right of way to A, there-

by prevent the State from granting the right to B. *All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right.*"

• • • • •

"The injustice and injury to private and public rights alike, which would arise, were it held that, after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road, or extort a heavy and exorbitant payment from the company first locating its line, as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location, but before the application to the Sheriff for the appointment of commissioners."

• • • • •

"If it be true that complainant, by making the purchase of the realty over which the defendant's line is located, has the right to prevent the completion of the road, then

it would be in the power of any company to prevent the construction of the competing lines by simply purchasing portions of the realty over which the line is located and placing thereon its own track."

In *Chesapeake & Ohio Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va., 641, 50 S. E., 890, the highest Court of that State examined the question fully upon principle, and also reviewed a large number of the authorities, and then said (57 W. Va., 666):

"This review of the authorities clearly, establishes the following principles: First, When the statute does not make the filing of a map or plat of a railroad location a prerequisite to the adoption of it, an appropriation of it may be made without the filing of such maps. Second. *The beginning of condemnation proceedings against the land owner is not a prerequisite to the acquisition of a right of way against third persons and rival companies.* Third. A mere survey made by the engineers of the railroad company, not adopted or determined upon by the corporation itself through its Board of Directors, or otherwise, as the location of the route does not amount to an appropriation, giving priority of right as against third persons. Fourth. A survey staked out upon the ground as a center line, a preliminary line, or as an actual location, whether delineated on paper or not, if adopted by the corporation, as aforesaid, is a location within the meaning of the statute, and *the company first making such location has a right to it superior*

to that of any other company. Fifth. A survey made by promoters of a railroad corporation for its purposes before the company is organized, or by an existing corporation for an extension of its road, before filing in the office of the Secretary of State a certificate of extension, may be adopted after incorporation or the filing of the certificate, as the case may be. Sixth. A location of a line, contemplated by original articles of incorporation, cannot be made before incorporation, nor can the location of a line contemplated by an extension be made before the certificate of extension has been filed as required by law. Seventh. A railway company may begin the work of location on any part of its contemplated route, and *a location of a part only of its road, may be held against a rival company, seeking the same location, as long as such locating company manifests good faith by the diligent prosecution of the work contemplated by its organization.*"

In *Williamsport & North Branch R. Co. v. Philadelphia & Erie R. Co.*, 141 Pa. St., 407, 12 L. R. A., 220, which is everywhere recognized as a leading case, it was held that a railroad is located, so as to exclude the appropriation of the land selected by other persons, *when a definite location has been adopted by the action of the company.* The successive steps necessary to acquire title to a roadway were stated to be, *first*, a preliminary entry on the lands of private owners for the purpose of exploration; *second*, a selection and adoption of a line by the directors of the company;

third, payment of compensations to the owner. The court then said:

"The title of the owner is not divested until the last of these steps has been taken.

• • •

"As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation. *As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title.* For this reason in several of the United States provision is made by law for recording the action of the company and the line adopted by it, so as to give notice to the public, and to settle questions of priority of title. We have no such statute and the action of the company must be proved by other competent evidence. *Heise v. Pennsylvania R. Co.*, 62 Pa., 72. *But when proved it has the same effect upon all interested as though it had been recorded.* It settles the date of actual appropriation, and shows the exact location of the line of the road proposed."

The case of *Rochester, Hornellsville and Lackawanna R. R. Co., v. New York, Lake Erie & Western R. R. Co.*, 44 Hun, 206; 110 N. Y., 128, is so exceedingly pertinent upon its facts and contains such a complete discussion of the principles involved that we beg to direct special attention to the opinions of both of the Supreme Court and the Court of Appeals. In that case a railroad company, which had located its line, *but had not acquired the title of the private owner or even com-*

menced a condemnation proceeding for that purpose, sought to enjoin another railroad company from constructing or operating its road upon the located line; and it obtained such injunction even though the defendant had obtained a lease of the land from the private owner and had taken possession under such lease.

In *Suburban Rapid Transit Co. v. Mayor, etc.*, 128 N. Y., 510, the New York Court of Appeals applied the same principle to an attempt by a city, under authority from the State, to take for park purposes a strip of land adopted as a railroad route though the railroad company had not yet acquired title to the land by condemnation proceedings. The opinion in that case is likewise emphatic in upholding the principle for which we contend, and we beg to direct special attention to it.

In *Nicomien Boom Co. v. North Shore Boom Co.*, 40 Wash., 315; 82 Pac., 412, the Supreme Court of Washington, applying the principles of the cases already cited, sustained the right of one boom company to enjoin another from constructing a boom within the limits of the territory included in the plat and survey filed by the plaintiff as showing the shore lines, lands, and waters it proposed to appropriate for its corporate purposes. The Court said (p. 325):

“Under legislative schemes for the location of railroad lines which are initiated by the filing of plats of location, it is held that compliance with the law in that particular secures to the locating company the right to construct and operate a railroad upon such line, exclusive in that respect, as to all other railroad corporations, and free from the interference of any party. *The*

*right to locate its line of road in the place of its selection is delegated to the corporation by the sovereign power. The further right to subsequently acquire, in invitum, the right of way and necessary lands for operation of the road from the land owners is likewise delegated. The source of the franchise is in the sovereign power, which power confers the franchise upon the corporation as its delegated representative, and the grant is for the public, and not for private, purposes. * * ** It is further held that, when a franchise has been thus conferred, no other railroad company may acquire title to the lands within such a location, or construct a road thereon, to the exclusion of the right of the first locating company to acquire such title *in invitum*, and to construct its road upon the lands. Injunction has also been adopted as the proper remedy to prevent such interference."

In *Barre R. R. Co. v. Railroad Companies*, 61 Vt. 1; 12 Alt. 923; 15 Am. St. Rep. 877; 4 L. R. A. 785, the controversy was between two companies designated by the Court as Barre Company and Granite Company. The Granite Company was organized on April 9, and it adopted a survey of its proposed road and caused the same to be filed on the same day. At that time the owner of the land in dispute had contracted to convey the land to the Barre Company and on April 10th he gave the Barre Company a deed for the land. It was contended, just as it is contended in the case at bar, that even if the Barre Company's purchase be regarded as subsequent to the adoption of the location, it yet gave that company the better right to

the land, because in any event the purchase was made "*before the Granite Company had paid or deposited the land damages and so became entitled under the statute to the seizin and possession of the land.*" The Court held, however, that the Granite Company had the better right. It quoted from the case of *Rochester H., L. & R. Co. v. New York, L. E. & W. R. Co.*, 110 N. Y. 128, as upholding the right of the company making the first location, and then said:

"The decisions in New Jersey and Pennsylvania and other states have been the same. *Indeed I have not found, and do not think there is a judicial decision or utterance to the contrary.*"

The Court further held that the fact that the owner of the land had previously made an unrecorded contract to convey to the Barre Company did not affect the case.

In *Fayetteville St. Ry. Co. v. Aberdeen R. R. Co.*, 142 N. C. 423; 55 S. E. 345; 9 Ann. Cas. 683, the company which first adopted a location *by resolution of its board of directors* was held to have a prior right to the route in controversy as against a rival company which *actually purchased the land from the owners after the adoption of the resolution of location but before the institution of a condemnation proceeding.* The Court said:

"On this question the authorities are to the effect that where the grants are indefinite, leaving the exact route to be selected by the company, the prior right will attach to that company which *first locates the line*: and, in the absence of statutory regulations to the contrary, the first location belongs to that company which first defines and marks

its route and adopts the same for its permanent location by authoritative corporate action. *Lewis on Eminent Domain*, vol. 2, sec. 366; *Railway v. Railway*, 141 Pa. St., 407; *Railway v. Railway*, 159 Pa. St., 331; *Johnston, Childs et als., exrs., v. Callery*, 184 Pa. St., 146; *Railway v. Blair et al.*, 9 N. J. Eq., 635; *Railway v. Railway*, 110 Fed. Rep., 879."

And also:

"In some of the authorities supporting this position it is stated as one of the requirements that the route, or line, after being surveyed, shall be platted and returned to the general offices of the company, and there approved as stated; and in others, that such survey and plats shall be filed in some public office and there recorded. But this will, no doubt, be found, on examination, to be on account of some public statute or provision of the charter, and is *not an incident of a completed location*, as a general proposition. There is no such statute with us."

These cases but reiterate the rules stated in many other cases, but we have quoted from them in order to bring sharply to the mind of the Court that from all the cases it is apparent that *neither the absence of a statute requiring the filing of a map nor the existence of a provision that the title of the private owner cannot be acquired in advance of actual payment of his compensation, affords any reason for holding that the doctrine that priority of location gives priority of right does not prevail in Ohio*. The cases clearly recognize that the private owner is not deprived of his rights

without the payment of compensation, and they point out how and why the doctrine does not infringe the constitutional rights of such owner.

Furthermore, the doctrine has been expressly recognized in Ohio. In *Ohio Southern R. R. Co. v. Cincinnati, Hamilton & Dayton R. R. Co.*, an unreported decision of the Court of Common Pleas of Jackson County, the pleadings and judgment in which we herewith furnish to the Court, the Ohio Southern Railroad Company sought to enjoin the Cincinnati, Hamilton & Dayton R. R. Co. "from disturbing *the survey, location, and designating marks* thereon and from laying its tracks and constructing a railroad over" certain premises described in its petition, *which premises the plaintiff company did not own by virtue of any purchase or condemnation proceeding.* The petition alleged that the defendant company, "having actual knowledge of *plaintiff's location and survey*" and "for the sole purpose of hindering plaintiff in its attempt to condemn," had obtained possession of the land in question and was engaged in constructing a switch thereon "upon and over *plaintiff's location.*" The defendant answered that the owner of the land in question had conveyed the same to the defendant by good and sufficient warranty deed and that defendant had paid such owner the full consideration therefor. The plaintiff replied that if the defendant had purchased the land in question it had done so "well knowing that plaintiff had *located its line as aforesaid.*" Upon these pleadings the court found "the facts set forth in the petition of plaintiff to be true," and thereupon perpetually enjoined the defendant "from disturbing *the survey, location, and designating marks thereon* and from

laying its tracks and constructing a railroad upon the premises named in the petition of plaintiff." It appears from the Certificate of the Clerk attached to the pleadings and judgment that an appeal was taken by the defendant, but that the same was thereafter dismissed for want of prosecution.

Although no opinion was written in the case to which we have just called attention, the precise question of whether the *location of a route without purchase or condemnation of the land* gave to the locating company a right to resist interference with the line by another corporation that had stepped in and purchased the land from the owner, was *directly involved* and was *decided*. It is also worth while and not improper to note that one of the counsel for the plaintiff in that case was the present Judge JONES of the Ohio Supreme Court.

In some of the earlier arguments in this litigation it has been asserted that the cases of

Adirondack Ry. Co. v. New York, 176
U. S., 335; affirming 160 N. Y. 225;
Underground R. R. v. New York, 193
U. S. 416; and
Ramapo Water Co. v. New York, 236
U. S., 579;

are opposed to our contention.

A slight examination of those cases will show that statement to be wholly unfounded.

In the *Underground Railroad case*, relief was denied because of the fact, clearly stated by this court in 193 U. S. at p. 429:

"The consent of the municipal authorities and the consent of the abutting owners, or the substituted consent of the Supreme

Court, were essential to the right to construct a railroad, and these it never obtained."

The company in that case could not demand the consents as a matter of right and could not acquire then *in invitum*, and yet its right to construct its road was expressly made dependent upon its obtaining them. Hence, in that case the company *did not have a complete grant*. It had never obtained a *right* to construct its road.

The *Adirondack case*, so far from being opposed to our claims clearly sustains them, for in that case it was said (160 N. Y. 246, approved 176 U. S. 346):

"The effect of the map when filed was to give warning to other railroads that a certain route had been pre-empted by the defendant. It established no right against the owner, because the Constitution forbids it; it established none against the State, because its power is paramount, *but as against all other railroad companies and as against ALL OTHER CREATURES OF THE STATE, empowered to use the right of eminent domain, it gave the exclusive right to occupy the particular strip of land for railroad purposes until the Legislature authorized it to be devoted to some other public use.*"

The *Ramapo case* likewise sustains our position, for while relief was denied in that case because the charter had been repealed by the Legislature and because that company *had not completed its location* by serving notices upon the landowners as required by the statute, this court expressly said (236 U. S. 584):

“We appreciate the argument that although the corporation may have had no lien on the land or right as against the sovereign power, *it had a right as against ALL SUBORDINATE BODIES to exclude them from the lands of its choice.*”

Furthermore, we call attention to the fact that, since the *Adirondack* and *Ramapo* cases were decided, the Court of Appeals of New York (in which State each of these cases arose) has again passed upon the question in *Matter of City of New York (Newport Avenue)*, 218 N. Y. 274, and that it there clearly stated that the doctrine that priority of location gives priority of right, “has always been applied in controversies between rival railroads” and is also “the rule in controversies between a railroad and a city.”

As opposed to this array of authorities, we have the declaration of Mr. Justice CLARKE, as District Judge, in *Sears v. Akron*, where, without impugning or criticising the soundness of the views expressed in the cases we have cited, he stated that the doctrine they announce does not prevail in Ohio. His opinion may be found in the printed record of *Sears v. Akron* now on file in this court. In it, he said:

“In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken, or payment made does not give to the plaintiff any title or right whatever legal or equitable in the lands embraced within such paper scheme. This is distinctly the settled law of Ohio, and the best expression of it is, I think, to be found in the case of *Columbus*

etc., Co. v. T. & O. C. Ry. Co., 32 W. L. B. 186. This is a Common Pleas Court decision, but it is well worked out and the absence of decision by higher courts on a question which must have frequently arisen is of itself confirmatory of its authority as an expression of the accepted law of the State. The Court says:

“ ‘ But the grant, by articles of incorporation to a railroad company of a right to construct a road is afloat; it attaches to no specific lands until the line of the road is sufficiently fixed by purchase of the land, or by condemnation proceedings and acceptance of the land condemned. Even after the land is condemned, the Railroad Company may elect not to pay the price and accept the land. The fact that Railroad Company has surveyed and staked a line upon certain grounds does not conclude it, why then should it conclude anybody else? The company may survey and stake more than one line and by comparing the cost and advantages of each of them, determine upon which it will build, but the line is not definitely established until the land is condemned, paid for or accepted, or purchased by agreement’.”

“So in *State of Ohio ex rel. v. Cincinnati*, 17 O. S. 103, the Court states what is well known to this Court to be the opinion of the profession of the State that ‘no appropriation of lands of the relators could be completed, no title from them could be acquired and no incumbrance could be imposed on their estate by the railroad company, until the amount of compensation fixed by the

findings of the jury was paid in money or secured to be paid by a deposit in money.'

"The plaintiff has no power of eminent domain greater or other than a railroad company has. In the State of Ohio there is not now and never has been any statute requiring a corporation desiring to exercise the right of eminent domain to file in any public office a map or survey of the route or plan of the improvement adopted by the company, so that the rule that land owners or other corporations are in any wise estopped or their property encumbered by the mere private resolution of a company possessing the power of eminent domain has **never prevailed** in this State as it has in some other States."

We recognize to the fullest extent the rule in Ohio that the private owner cannot be deprived of his title or possession until his compensation has been assessed and paid, and that prior to that time no eminent domain corporation acquires the title of the private owner or any right to exclude him from his land. We do not at all dispute *State ex rel. v. Cincinnati*, 17 Ohio St., 103, or *Wagner v. Railroad Co.*, 38 Ohio St. 32, cited by the Court below. *We are not claiming the title of the private owner.* What we claim is what has been granted by the State—the *right or franchise to acquire the title of the private owner* by fixing and paying the compensation, *free from the interference of third persons.* And as was aptly said in *Sioux City &c., Co. v. Chicago &c., Co.*, *supra*, which arose under statutes identical with the statutes of Ohio requiring the advance payment of compensation to the owner:

“Although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement. * * * All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right of way and can, by statute, prescribe when, and by what acts, the right thereto shall vest.”

Our contention—the ultimate basis of the cases upon which we rely—is that in adopting its location the corporation is exercising the power of eminent domain granted to it by the State, to the exercise of which power the title of the private owner is always subject. When, therefore, a corporation, acting pursuant to statutory authority from the State, resolves to acquire certain land for a public use, it does not “estop” the landowners or place any “incumbrance” upon their property. The land was *always* liable to an exercise of the power of eminent domain (*Long Island Water Supply Co., v. Brooklyn*, 166 U. S. 685), or, as stated in the Ohio Constitution, the owner’s title was *always* “subservient to the public welfare” (Art. 1, Sec. 19). The power of eminent domain “constitutes a condition upon which all property is holden” (*Kramer v. Cleveland & Pittsburg R. R. Co.*, 5 Ohio St. 140, 146). It is an inseparable incident of sovereignty which may be exercised at any time either directly by the State or indirectly by such agency as it may select, including “the instrumentality of private individuals incorporated for the pur-

pose" (*Giesy v. Cincinnati, W. & Z R. R. Co.*, 4 Ohio St. 308).

If the use be public (and that has been adjudicated in this case by *White v. Little Miami Light, Heat & Power Co.*, 77 Ohio St. 633, and also by *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U. S. 30), the landowner cannot defeat or prevent a taking of his land. His only right is to receive compensation. If the State of Ohio had specifically declared in some legislative enactment that it was necessary in order to carry out a stated public purpose to acquire certain specifically described parcels of land and that the State "does hereby appropriate and condemn ~~and~~ and all of the following described real property and estate for the uses and purposes aforesaid," no one would contend that the landowner could defeat the State's declared purpose by conveying the land to a railroad company or to a municipality, or that any third person could thereafter appropriate the land to an inconsistent use. The situation is not different merely because in this instance the State, instead of acting directly, has chosen to act through "the instrumentality of private individuals incorporated for the purpose." And no one having the slightest knowledge or regard for the fundamental principles of eminent domain should have any hesitancy in accepting the claim that when these "individuals incorporated for the purpose" have made a similar resolution, their absolute right to acquire the legal title to the soil by assessing and paying the compensation cannot be impeded or impaired by the act of the private owner in making a subsequent conveyance or by the acts of third parties in attempting to use the land for an inconsistent purpose.

This is the simple proposition upon which we rely, and it is a proposition which has been accepted and acted upon by every court to which it has been presented, save the Court below.

We say "save the Court below" advisedly, for while the opinion in the case of *Columbus, etc. Co. v. Toledo, etc., Ry. Co.*, 32 Weekly Law Bulletin, 186; 1 Ohio Decisions, 627, contains *dicta* at variance with every case that has ever been decided upon the subject, the actual *decision* fully sustains the rights of the plaintiff under the facts here presented. That was a suit to enjoin the prosecution of a proceeding in the Probate Court for the acquisition of a parcel of land which was included in the plaintiff's line of route as surveyed. The defendant had commenced *but not completed* its condemnation proceeding, and it was held to have a right to the land prior and superior to a company which had not purchased or commenced a condemnation proceeding. The actual decision of the Court, as stated in the syllabus, was as follows:

"The franchise granted to a railroad company by its incorporation *conferred the right to select for itself the precise line on which the road is to be built* between the terminal points fixed by the incorporation; but its selection of the line by surveying it, and setting stakes, in the absence of a purchase or condemnation of the land, did not bestow upon it a right to the land covered by the line which is exclusive as to another railroad company that subsequently surveyed and staked the same line, *but first began condemnation proceedings to have it appropriated for its purposes.*"

The case thus clearly recognizes the charter as a grant of a franchise by the State, which includes, as an essential element, the right to select the precise lands to be acquired, and it accorded priority of right to the company which *first commenced condemnation proceedings*, even though the proceedings had not been prosecuted to judgment. The plaintiff in this case stands in the position of the *defendant* in that case, not in the position of the *plaintiff*. It commenced its condemnation proceedings *before* the defendants here had located, purchased or condemned, and the defendants thus acted *pendente lite*, with actual and constructive notice of the plaintiff's rights.

Furthermore, we respectfully submit that the doctrine *must* prevail in Ohio, because to deny the doctrine is to deny the State's sovereign power of eminent domain and make the title of the private owner *paramount* to the public welfare instead of *subservient* to it as expressly declared in the Ohio Constitution.

A brief consideration of what is actually involved in a corporation's selection and location of its route or place will, we believe, conclusively demonstrate this statement.

The theory upon which Judge CLARKE has said that in Ohio a corporate resolution fixing the location of its improvement gives the company no legal or equitable right or title to or against the lands described, is that where, as in that State, the corporation does not have to file any map of the route adopted or place selected it can change its location as often as it sees fit, at least until it has acquired and paid for the land upon which its proposed improvement is to be built, and as the corporation is not until then confined to the route

or place selected it is not until then entitled to hold the route or place as against third parties or rival corporations (See quotation from his opinion at pages *supra*).

This theory, we submit, contains several errors and is not sound.

(a) *The filed map is not the location but merely the evidence thereof.*

The first error in this theory is the wholly unwarranted effect attributed to the *filing of a map*. Of course if there be a statute requiring the filing of a map the statute must be complied with. But the absence of a statute authorizing or requiring such filing does not destroy the efficacy of a location. This has been expressly decided in many cases (see *Fayetteville, etc. Co. v. Aberdeen, etc. Co.*, 142 N. C., 423; *Williamsport & N. B. R. R. Co. v. Philadelphia & Erie R. Co.*, 141 Pa. 407; 12 L. R. A., 220; *Chesapeake & Ohio Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641; *Denver & Rio Grande R. R. Co. v. Colorado & Arizona R. R. Co.*, 233 U. S. 601), and the reason is that neither the map nor the requirement for its filing either makes the location or constitutes the grant which gives the right to locate. The purpose of the map is to place in convenient and accessible form permanent record evidence of the true and exact location and boundaries of the road (see 33 *Cyc.*, 128, and *Williamsport & N. B. R. R. Co. v. Philadelphia & Erie R. Co.*, *supra*). It is not the location itself and any other competent and satisfactory proof of the location is quite as efficacious as the map (*Denver & Rio Grande R. Co. v. Colorado & Arizona R. Co.*, *supra* and *Williamsport case*, *supra*.)

It would, indeed, be very strange and incongruous if the mere failure of the State to provide

a place in which to file a map of the location should defeat the location itself. Paraphrasing the language of this Court in *Tarpey v. Madsen*, 178 U. S., 215, 219, the right of a company which has actually adopted a route or place with an intent to construct its improvement thereon cannot be defeated by the mere lack of a place in which to make a record of its intent.

(b) *A change of location cannot be compelled even though the corporation might make a change for itself.*

A second fallacy in the theory is that even if its promise be true—even though the corporation might change its route at will up to the time the land is “condemned, paid for and accepted”—the conclusion is unsound; for it by no means follows that any and every third person is at liberty to make a change for it. The fact that the corporation *may* make a change for itself does not *compel* it to change at the behest and dictation of third persons, and yet this is precisely what the theory just stated really amounts to. The right to change a route implies the right to adopt one, and the right *not* to change it. It does not imply, but negatives the idea, that third parties may compel the company to make a change it does not care to make. It is, indeed, irrelevant to discuss whether the corporation has a right to make a change. The question really is whether it has a right to the place which it originally selects and desires to hold; and that question may well be answered by asking by what authority does the second corporation claim the right to deprive it of that place? Can an answer to that question be framed which does not recognize the right of the prior locator to hold the place?

(c) *A location once adopted cannot be changed by the corporation without a further grant of power from the State.*

The theory is further erroneous in its false assumption that the adoption of a location is not final and conclusive and does not "definitely fix" the site or place of the road or other improvement.

Since 1852 the statutes of Ohio, like the statutes of most other States, have provided for the formation of corporations by the filing of articles of incorporation pursuant to general laws, which articles are required to state the *termini* of any proposed improvement which is not to be located at a single place (Ohio Gen. Code, Sec. 8626). When a *railroad corporation* is thus formed it has, by grant from the State, a right "to construct, maintain and operate a railroad between the terminal points named in the articles" (See Ohio Gen. Code, Sec. 8745, which is derived from an act passed in 1852). When a *power company* is thus formed it has, by like grant, a right to construct, maintain and operate its plant and enter upon, survey, and appropriate all lands necessary therefor (*Id.*, Secs. 10,128—10,134). It is well settled that such a grant gives to the company *the power to locate* between the terminal points mentioned *and a discretion as to the exact place to be adopted* (*Callender v. Painesville, R. R. Co.*, 11 Ohio St. 424; *Walker v. Mad River R. R. Co.*, 8 Ohio, 38). We agree that merely surveying and staking a line does not amount to a location or conclude the corporation. That work is merely preliminary and experimental and is performed by the company's engineers. To constitute a *location* the survey must then be *adopted* by the company, acting through its Board of Directors.

in whom is vested the power to "locate and construct the road" and who may, of course, choose and select which survey of several they will adopt.*

But when the board of directors has thus adopted the route or place where the improvement is to be built, the indefinite or distributive or floating grant of the right to construct the improvement between the specified *termini* over such a line of route as it may select, has become definite and precise and attached to the specific lands covered by the resolution; and it has been twice squarely held by the Ohio Supreme Court that the *permanent location* is then made.

*Chamberlain v. Painesville & Hudson
R. R. Co.*, 15 Ohio St., 225.

Ashtabula etc. Co. v. Smith, 15 Ohio St.,
328, 335.

Each of the cases just cited was an action upon a subscription for stock of a railroad company

*In a number of cases the Supreme Court of Ohio has said that the powers of a corporation fall into two classes—such as may be exercised before and such as cannot be until after the election of directors. "Among the former," it is said, "is the right to receive subscriptions to the capital stock and the election of directors; and among the latter is the location and construction of the proposed road * * * The condemnation of land for the construction of the road comes within the powers to be exercised by the corporation through its directors." *Powers v. Railroad Co.*, 33 Ohio St., 429; *Ashtabula, &c., R. Co. v. Smith*, 15 Ohio St., 328; *State ex rel. v. Insurance Co.*, 49 Ohio St., 504, 524.

The difference between the preliminary survey by the engineers and the adoption of the route by the directors is recognized in all the cases (see particularly *Williamsport & N. B. R. R. Co. v. Philadelphia & Erie R. R. Co.*, 141 Pa., 407, and *Chesapeake & Ohio Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va., 641). The engineers survey, but they cannot bind the corporation. They simply report their work to their superiors.

which was made upon condition that the road be *located* at a particular place. In each case it was contended that the condition was not complied with because the road had not yet been *constructed* on the designated route, and in each case the contention was rejected. In the case last cited the only showing made with respect to the location of the road was the averment of the petition that *upon a specified date* "the Board of Directors of the plaintiff did cause to be surveyed and *did locate* the railroad," and this was held sufficient, the Court saying (p. 335):

"The language in question, is *used to designate the line, or route, upon which the road was to be constructed*, and the averments in the petition, in our opinion, show a compliance, on the part of the plaintiff, with all that can be fairly required."

Here, therefore, are two authoritative decisions of the Supreme Court of the State that the *location of the road is made by the act of the directors of the corporation in adopting a resolution fixing the place where the road is to be constructed, and that a location so made is conclusive and binding*. The latter proposition is necessarily involved in the decisions because otherwise the condition of the subscriptions that the road be *located* at a particular place would not have been fulfilled.

Moreover, does the right to select the route imply the right to select several routes? May the directors adopt and abandon routes at will, or does the adoption of one route exhaust their power? When it is remembered that in exercising this power of location the directors are acting pursuant to a grant of sovereign power from the

State—a grant which it is always recognized must be strictly construed—the answer to these questions is obvious. And so it has been repeatedly adjudicated, in Ohio as elsewhere, that *when a company has definitely adopted a particular location for its road it cannot change it without legislative authority.*

Moorhead v. Little Miami R. R. Co., 17 Ohio, 340.

Little Miami R. R. Co. v. Naylor, 2 Ohio St., 235.

Works v. Junction R. R. Co., 5 McLean, 425, Federal Case No. 18046, per Mr. Justice McLEAN.

As was said in *Erie Railroad Co. v. Stewart*, 170 N. Y., 172, 179:

“When the company had located its line of road between its terminal points, pursuant to the requirement of its charter, it was concluded by that location and no change of its route could thereafter be made, in the absence of legislative authority. *The effect of the designation by the directors of the line of the road was the same as if the line had been described in charter and the operation by the corporation of a railway limited thereto.*”

The same principle was applied in the earlier case of *Matter of Poughkeepsie Bridge Co.*, 108 N. Y., 483, which is peculiarly appropriate because it is based upon the authority of the Ohio cases cited above. Thus, at page 493, the Court said:

“This, we think, exhausted its power of choice and the location so made was final and could not be changed in the absence of

legislative authority. This view is supported by judicial opinions and decisions. (*H. & D. Canal Co. v. N. Y. & E. R. R. Co.*, 9 Paige, 323; *Mason v. Brooklyn City & N. R. R. Co.*, 35 Barb., 381; *Moorehead v. Little M. R. R. Co.*, 17 Ohio, 349; *Same v. Naylor*, 2 Ohio St., 235.)”

That these New York cases correctly interpret the Ohio decisions is clearly shown by the fact that in *Little Miami R. R. Co. v. Naylor*, *supra*, the Ohio Court said:

“The strip of country, from which the road may select its tracks, is frequently several miles in width. This extent of country is not all appropriated to the use of the road, but only so much as may be necessary for a track; its right to it is simply one of selection, *and when it has made its selection, its rights over all the other territory ceases.*”

The existing *statutes* of Ohio afford a further and conclusive proof that the accepted law of that State is that a location once made by the directors cannot be changed without explicit authority from the Legislature. For it has been found necessary in that State to pass three separate acts permitting railroads to change their locations; and those statutes permit such changes only to a limited extent and only for certain specified reasons.

The first act was passed in 1848, and, with some changes, it became Section 3277 of the Revised Statutes, now Section 8753 of the General Code.*

*See Act of February 11, 1848, 46 Ohio Laws, 44, Section 10; Act of May 1, 1852, 50 Ohio Laws, 276, Section 11; Act of April 5, 1866, 63 Ohio Laws, 141, Section 11; Act of March 8, 1865, 62 Ohio Laws, 36.

The second act was passed in 1871 and became Section 3275 of the Revised Statutes, now Section 8750 of the General Code.† The third act was passed in 1876 and became Section 3272 of the Revised Statutes, now Section 8747 of the General Code.‡

Section 8753 authorizes a change of location or grade "for the purpose of avoiding annoyance to public travel or dangerous or difficult curves or grades or unsafe or unsubstantial grounds or foundations, or when the roadbed has been injured or destroyed by the current of a river, watercourse, or other unavoidable or reasonable cause," but it further provides that the company "shall not depart from the general route prescribed in the articles of incorporation."

Section 8750 provides that when a company, "the line of whose road has not been finally located in whole or in part, finds it necessary, in order to avoid dangerous or difficult curves, grades or dangerous or unsubstantial grounds, or foundations, or for other reasonable cause, to pass through a county not named in the articles of incorporation, or to avoid passing into or through a county named therein, other than a county in which a terminus of the road has been fixed by its articles of incorporation, or in which is located a point or place by or through which the line of such road is to pass," *a certificate of such facts may be made and filed with the Secretary of State*. It further provides, however, that it shall not be construed to authorize "the abandonment of any part of the company's line which is finally located, or a change of the general route of the line of such road, or the terminal points named in

†See Act of May 2, 1871, 68 Ohio Laws, 129; Act of March 30, 1874, 71 Ohio Laws, 54.

‡See Act of April 7, 1876, 73 Ohio Laws, 115.

the articles of incorporation.” It is, moreover, further provided that when a company’s line is diverted from a county named in its articles, *the company shall be liable to any person owning land in the county for damages caused by the change or diversion, and that all subscribers to the capital stock on the line of that part of the road which is so changed shall be released from all obligation to pay their subscriptions (§8751).*

Section 8747 provides that “*by a resolution adopted by a majority of its board of directors,*” and with the consent of three-fourths in interest of its stockholders, a company “may change the line, or any part thereof, and either of the proposed termini of its road.” No change is to be made, however, which will “involve the abandonment of any part of the road, either partly or completely constructed,” and any subscription of stock made upon the faith of the location of the road upon a line abandoned by the change shall be cancelled at the written request of the subscriber. Such a change must be described in a resolution under the seal of the company and filed with the Secretary of State (§8748). Any mortgage issued by the company must be recorded in the county in which the changed line is to pass (§8749). It is further provided that when the directors’ resolution has been filed the change of location “shall be considered as made and be as *valid and binding as if the changed line had been the line originally described in the articles (Sec. 8748).*”

These statutes clearly recognize that when the line is once adopted it cannot be changed by the company *except as authorized by statute*, or, in other words, without the consent of the State or a further grant of power from the State. The “ac-

cepted law of the State" thus is that the adoption of a location *does* conclude the corporation, and even when it obtains a grant of power from the State to make a change it is still liable for the damages caused by the change, and subscriptions made upon the faith of the original location are cancelled.

It is vitally important, too, to note that the change is to be made *by a resolution of the board of directors and that when so made it is as valid and binding as if the changed line had been described in the articles of incorporation.* The plain meaning is that the route or *place or location* described in the articles is valid and binding, which is but another way of saying that when, in accordance with the Ohio statute, the location is stated in the articles, the corporation is entitled to the location so stated.

(d) Location must precede condemnation or purchase of the lands, both as a matter of law and as a matter of practical necessity.

No directors of any corporation can or do go out and purchase lands, hit or miss, without previously adopting a plan and resolving upon the *location* of the improvement to be constructed.

The statutes of Ohio further require that when the corporation attempts to condemn the land necessary for its improvement it shall file a petition containing a "specific description" of the lands to be appropriated (Ohio General Code, §11042), and that in the appropriation proceeding it shall show the necessity for the appropriation (*id.*, §§11042, 11046). Obviously the petition could not be drawn until a definite location had been adopted, for otherwise it could not contain a specific description of the lands to be appro-

priated. It is equally apparent that the company could not show any necessity for any particular parcel of land unless it could show that it had definitely located the place where the improvement is to be constituted. *It is, therefore, both a legal and a practical necessity that final location precede condemnation.* For this reason, if for no other, the idea that the location is not definitely and finally fixed until the land is actually purchased or condemned is obviously erroneous.

(e) The adoption of the corporate resolution concludes not only the corporation but also the courts and the private owners, save in cases of abuse of power, and the adoption of such resolution is the act which legally subjects the land to the public use.

The fifth and most fundamental error in the theory stated above is its *failure to recognize that the corporation's adoption of its resolution is an act performed in the exercise of sovereign power delegated to it by the State.* It is in this respect that the theory contradicts the fundamental principles of eminent domain—the subserviency of the private title to the public welfare.

Ohio, like every other state, has always recognized that the power of eminent domain is public, not private; political, not judicial; and is vested in the Legislature, not in the courts or in the individual owners of the soil.

Giesy v. Cincinnati, W & Z. R. R. Co.,
4 Ohio St., 308.

Kramer v. Cleveland & Pittsburg R. R.
Co., 5 Ohio St., 140, 146.

As already stated, it always exists and may be exercised at any time, either directly or through

the agency of corporations organized for the purpose. Its exercise "can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted" (*Kramer v. Cleveland & Pittsburg R. R. Co.*, *supra*) and "IT REQUIRES NO JUDICIAL CONDEMNATION TO SUBJECT PRIVATE PROPERTY TO PUBLIC USES" (*idem*, p. 146).

It is, furthermore, an established rule, which we know will not be questioned by the defendants in this case, that "it is not upon the question of appropriation of lands for a public use, but upon that of compensation for lands so appropriated that the owner is entitled to a hearing in court and the verdict of a jury."

Zimmerman v. Canfield, 42 Ohio St., 463, 471.

Cuyhoga River Power Co. v. Akron, 210 Fed., 524, 527, per Judge DAY, and cases there cited.

The propriety and necessity for the appropriation are questions committed to the discretion of the agency in which the power of eminent domain is vested.

Geisy v. Cincinnati, W & Z. R. R. Co., *supra*.

Kramer v. Cleveland & Pittsburg R. R. Co., *supra*.

Bowersox v. Watson, 20 Ohio St., 496 507.

Cincinnati v. Louisville & Nashville R. R. Co., 223 U. S., 390, where this Court, in a case involving the power of eminent domain in Ohio, said that when the use is public "the propriety or expediency of the appropriation

cannot be called in question by any other authority."

It is true that under the present statute of Ohio, relative to condemnation proceedings, the necessity for the appropriation must be ascertained by the Court in advance of the impaneling of the jury which is to assess the compensation of the private owner (§11046), but the enactment of this statute did not establish a new condition to the exercise of the power of eminent domain, for the power is founded upon and is always limited by public necessity (*Giesy v. Cincinnati, W. & Z. R. R. Co.*, *supra*, and *Powers v. Railroad Co.*, 33 Ohio St., 429), and the only power of the Court under the statute is to *prevent an abuse of power by the corporation*. The statute does not substitute the opinion of the Court for the opinion of the condemning party or give the Court power to overrule the corporation's discretion in determining the question of necessity where no abuse of power is shown.

Wheeling & Lake Erie R. R. Co. v. Toledo Ry. & Ter. Co., 72 Ohio St., 368.
Bowersox v. Watson, 20 Ohio St., 496,
 507.

It is evident, too, that the determination of the Court upon the preliminary questions specified in the statute does not *create* the right to appropriate or the necessity for the appropriation, but merely *ascertains* and *declares* the *prior existence* of the right and necessity.

When, therefore, the Legislature has vested a corporation with the power of eminent domain and that corporation resolves to exercise the power as against certain lands, neither the landowner, nor the Court, nor any third person, can

deny or defeat the appropriation, save in the exceptional case where the corporation is proceeding in manifest and gross abuse of power, or, in other words, where it is proceeding without any authority at all.

What, then, is the effect of the resolution that the land is necessary and that the corporation "does hereby appropriate and condemn" the land? Clearly there is involved in such resolution a determination of the necessity and an immediate appropriation of the land to the uses of the corporation—not an appropriation in the sense of the acquisition of the title of the private owner, but an appropriation in the usual meaning of the word as a *setting apart* of the land for the use of the corporation, a *subjection of the land to the public use*. For that purpose, as we have already seen, NO JUDICIAL CONDEMNATION IS NECESSARY (*Kramer v. Cleveland & Pittsburg R. R. Co., supra*). The resolution, therefore, is conclusive upon everyone—corporation, court, landowner and third persons—unless, of course, its complete invalidity can be shown by showing an abuse of power. In the absence of such abuse the corporation's own selection of and determination to acquire the land effectually subjects it to its will and sets it apart for its use, precisely the same as if the resolution, instead of being passed by the agent of the State pursuant to its delegated power of eminent domain, had been enacted by the Legislature itself pursuant to its own sovereign power.

In view of these numerous statutes and decisions, which truly express "the settled law of Ohio," we respectfully submit that there can be no escape from the conclusion that the doctrine of priority of location is neither occult nor arbitrary,

nor the product of statutes having no counterpart in Ohio, but that it is, on the contrary, a simple and obvious application of the principles of eminent domain, which are the same in Ohio as in all other states, and is, indeed, a necessary corollary to the existence of the power itself.

Leaving off as we began, the State has delegated to the plaintiff the sovereign power of eminent domain, giving to it a discretion as to the propriety and necessity for its exercise within the limits prescribed by the charter, and the corporation having, in the exercise of its discretion, determined what land is necessary for the purpose for which it is authorized to make appropriations, and having committed no abuse of its power, neither the Courts, nor the landowners, nor third persons can say it nay. Its absolute right to assess and pay the owner's compensation and thus acquire full right to use and possess the lands in question is an inevitable consequence.

In other words, the statutes and decisions make it perfectly clear that the *right of way* of a railroad or other similar corporation *does not consist of the ownership of the soil*, but is exactly what its name implies, *viz: a right to a place*, and is derived, not from individual owners of the land, but from the sovereign; and when it is said that the corporation which first locates its route or place has a prior right to the land covered thereby, it is simply another way of saying that the corporation is entitled to hold the *right of way* granted to it by the sovereign, free from the interference of subsequent grantees. And the *right of way* is specifically protected from appropriation to the use of another corporation by Article 13, Section 5. of the Ohio Constitution, which reads as follows:

"No *right of way* shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a Court of record, as shall be prescribed by law."

Finally, this conclusion is, from another viewpoint, reinforced and placed beyond the possibility of dispute by the decisions of this Court in cases relating to the respective rights of railroads and homesteaders upon the public lands of the United States under the Right of Way Act of March 3, 1875 (18 Stat., 482; 2 U. S. Comp. Stat., 1916 Sections 4921-4926). By that act Congress granted "the right of way through the public lands of the United States * * * to any railroad company duly organized under the laws of any State or territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same." Any company desiring to secure the benefits of the act was required "within twelve months after the *location* of any section of twenty-five miles of its road" to file with the Register of the Land Office a profile of its road and have the same approved by the Secretary of the Interior. It was further provided that "thereafter all lands over which such right of way shall pass shall be disposed of subject to such right of way."

That act has been determined to be a *grant in praesenti* of a *right of way over lands to be thereafter identified*, and although no specific grantee

is named in the act, a railroad company becomes a grantee by filing its articles of incorporation and due proofs of its organization with the Secretary of the Interior, and it then has a right which cannot be taken away.

Noble v. Union River Logging R. R.,
147 U. S., 165, 176.

Jamestown, &c., Co. v. Jones, 177 U.
S., 125, 130.

See, also, *Rio Grande Ry. v. Stringham*, 239 U. S., 44, 47, where the nature of the right granted is defined, and *Pearsall v. Great Northern Ry.*, 161 U. S., 646, 662, where the *Noble* case is cited as an illustration of the sanctity of corporate grants.

The act is, therefore, in all respects analogous to the grant of a right of way obtained by the adoption of a plan of development by a company under State laws like the statutes of Ohio; and the decisions which have been rendered by this Court upon the question when the right to specifically identified lands becomes vested under that act are in point and controlling here.

In a controversy arising under that act, it was decided that where a road has been actually constructed the company is entitled to hold its right of way as against a settler who subsequently enters upon the land *even though no map of the road has been filed* as required by the statute (*Jamestown &c., R. Co. v. Jones*, 177 U. S., 125, as explained in *Barlow v. Northern Pac. Ry. Co.*, 240 U. S., 484). Later, a controversy arose between a railroad company and "a settler holding a patent of the United States whose right had been initiated *before the construction* of the rail-

road but *after a preliminary survey* which had been made by the railroad as a means of ultimately determining upon what line it would build its road, the stakes of such survey being, at the time the settler initiated his right, across the land in question;" and it was decided "that as a mere preliminary step for the purpose of determining where the road should be located was not in and of itself the equivalent of a definite location of the line and a permanent appropriation of the right of way, the case was not governed by the rule in the *Jones* case and the right of the settler was paramount" (*Minneapolis, &c., Ry. Co. v. Doughty*, 208 U. S., 251, as explained in *Barlow v. Northern Pac. Ry. Co., supra*). Still later, in the case of *Barlow v. Northern Pac. Ry. Co., supra*, a controversy arose between a railroad and a settler who entered upon the land under the pre-emption laws of the United States at a time when the land had been graded for a railroad but *when no railroad had been actually constructed and no map or profile of the road had been filed*. It was held that under these facts the *Jones* case was controlling and the right of the railroad was sustained. The opinion is by Mr. Chief Justice WHITE, and in that opinion it was said:

"That under these facts the Court below was right in holding that the controversy was foreclosed by the ruling in the *Jones* case we think is too clear for anything but statement. The contention that the case is controlled by the *Doughty* and not the *Jones* case because the road was not complete and operating when the entryman initiated his rights although it was then graded and was virtually ready for the ties and rails, if acceded to, would render the stat-

ute inefficacious and dominate the substance of things by the mere shadow. The first, because as it is impossible to conceive of the completion of the road by the placing of ties and the laying of rails without presupposing the prior doing of the work of grading, it would follow that the recognition of the right of an entryman to appropriate adversely to the railroad after the grading had been done and before the laying of the ties and rails would render the performance of the latter useless and would deprive the railroad therefore of all practical power to appropriate. The second, because as pointed out in *Stalker v. Oregon Short Line*, 225 U. S., 242, the decision in the *Jones* case rested not upon the ground that the work of construction had reached the absolutely completed stage so as to enable the road to be operated, but on the fact that the work was of such a character as to manifest that THE RAILROAD COMPANY HAD EXERCISED ITS JUDGMENT AS TO WHERE ITS LINE WAS TO BE ESTABLISHED and had done such work of construction as 'necessarily fixes the position of the route and consummates the purpose for which the grant of a right of way is given' (p. 150). And it is obvious that this standard when complied with would serve not only to demonstrate the *fixed intention of the railroad* to appropriate, but also to give tangible and indubitable evidence to others of the right of way appropriated, thus preventing injury to innocent persons which might result from their selection of land in ignorance of the fact of its prior

appropriation. The distinction between the doctrine of the *Jones* case and that of the *Doughty* case is therefore that which necessarily must obtain between permanent work of construction of a railroad on a *line definitely selected and fixed by it*, and *mere tentative work* of surveying done by a railroad for the purpose of enabling the line which it was proposed to construct to be *ultimately selected*."

Thus, in determining when a grant of a right of way over lands to be thereafter identified becomes fixed, this Court has rejected the extremes of actual construction on the one hand and mere preliminary surveys on the other, and has squarely held that *the determining factor is the company's own exercise of its judgment as to where the line is to be established*; and it has given effect to *the company's own selection* of the specific lands to be used as *definitely fixing* the right of the company to those specific lands, even though the statute under which the grant was made required the filing of a map. It needs but a paraphrase of language, without an iota of change in principle, to make the decision in the *Barlow* case a final and conclusive pronouncement that when the plaintiff adopted its resolution its right to acquire those lands by assessing and paying the compensation of the private owners was *absolutely fixed beyond the possibility of defeat or impairment* by the act of rival companies purchasing the lands from the owners.

POINT II

The plaintiff is entitled to equitable relief as prayed for in the bill.

Upon the argument below the defendants earnestly insisted that the plaintiff has an adequate remedy at law—that its proper and only remedy, if any, is a condemnation proceeding. They further argued that their acts do not constitute a *taking* of any property or right of the plaintiff and hence there was no right to an injunction. The lower Court, while not specifically acceding to those contentions, declared that it did not appear that the plaintiff's operations “are interfered with in any *practical* way by defendant's use of its property” (Rec. p. 38), and that pending the time when the plaintiff should complete a condemnation proceeding it saw no reason why the Traction Company should not be permitted to use the land for power-development purposes (Rec., p. 40). It furthermore distinguished *The Binghamton Bridge*, 3 Wall. 51, and *Hamilton G. & C. Traction Co. v. Hamilton & L. El. Transit Co.*, 69 Ohio St. 402, upon the ground that in those cases the question was “one of *actual and present interference* with the rights of the corporation in the operative enjoyment of the privileges of its charter” (Rec. p. 40).

In short, the Court's view seems to have been that, conceding that the plaintiff had an indefeasible property right to proceed with its development, the acts of the defendants could not constitute an invasion of or interference with that right in any substantial or practical sense until the plaintiff became ready to enter upon the land for purposes of actual construction, and as it could not make such physical entry until it had completed a condemnation proceeding, there was no reason for granting an injunction now.

From a *practical standpoint*, that view is quite erroneous because it loses sight of the practical

difficulties thrown in the plaintiff's way by the very fact that the defendants are using the land for power-development purposes and asserting that such use is a bar to the plaintiff's right to acquire the land for itself. Such use and claim by the defendants interferes, not only with the plaintiff's acquisition of the particular parcels here involved, but, also, with its acquisition of other lands and the taking of the other steps necessary to complete its plan. How can the plaintiff, as a matter of business judgment and common sense, go ahead with the purchase of other lands, the construction of dams, or the purchase of machinery, equipment, or appliances, when it is uncertain as to whether it will be able to obtain the lands here involved, which are an essential part of the enterprise? The Court below criticized the plaintiff because so far it has not done much for the public by way of improving the water power of the river (Rec., p. 38)—quite unmindful of the fact that the cloud which the defendants' acts and claims have cast upon the plaintiff's right to proceed, and which the Court has refused by its decree to remove, is the very cause and reason why the plaintiff has been so far unable to enter upon actual performance of its public functions. It seems inconsistent and rather unfair for the Court thus to criticise the plaintiff for not proceeding and at the same time refuse to give it that protection from interference which alone will enable it to proceed. A clear title is the first requisite of any enterprise; and a reasonable certainty of the right to complete an undertaking is, in a very real and practical sense, the *sine qua non* of its commencement. (Compare, *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S., 574, at top of page 585). As said

by this Court in another connection, the plaintiff's grant was made and received with the understanding that it is "protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated as well as after that performance," and "it would be virtually impossible to fulfill the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way" the grant may be interfered with by the acts of third parties (*N. Y. Elec. Lines v. Empire City Subway*, 235 U. S., 179, p. 193). It is idle, therefore, to say that there is no present, actual or practical interference with the plaintiff's operations or with its charter privileges. The interference with the plaintiff's operations caused by the acts of the defendants in this case is just as "practical" and just as "actual and present" as was the interference in *The Binghamton Bridge, supra*, and *Hamilton G. & C. Traction Co. v. Hamilton & L. Electric Transit Co., supra*; and the distinction taken by the lower Court between those cases and this is not real.

From a *legal standpoint*, also, the view entertained by the lower Court and the contentions there urged by the defendants are quite unsound.

Of course we recognize, as already stated, that a private owner of lands desired for a public improvement has the right, under constitution and statutes of Ohio as under the constitution and statutes of many other states, to retain the title and possession of his land until his compensation has been assessed and paid. But that rule does

not affect this case, nor does it deprive the plaintiff of the right to equitable relief, because:

(1) The defendants do *not* hold as private owners. Although, as alleged in the bill, their use of the land is, in law, a *private use* because lacking the legal requisites of a *public use*, they nevertheless assert and claim a public use, hostile to the plaintiff's use, and ground their assertion and claim upon State laws the validity of which is challenged by the bill.

(2) The object of the bill is not to obtain possession as against a private owner in advance of the payment of compensation, but to enjoin *quasi*-public corporations, acting under color of authority of State laws, from taking and interfering with the plaintiff's franchise.

(3) Even if a condemnation proceeding were an adequate remedy (which it is not) it is *available only in the State Court*, and hence is not such a legal remedy as will defeat the plaintiff's right to the relief obtainable in Federal Courts of equity.

The defendants do not stand in the position of a landowner against whom a condemnation proceeding has been commenced and who insists upon holding his land as against the condemning corporation until it has divested his title by payment of his compensation. They are *third persons*, who (subsequent to the accrual of plaintiff's rights and actually subsequent to the commencement of a condemnation proceeding) have entered upon and taken possession of the land, not as a private owner but as the possessors of a rival franchise from the State, and have and are threatening to place upon the land permanent structures for the purpose of generating hydro-electric

power and large mortgage liens having the apparent and ostensible authority and approval of the State Public Utilities Commission. They have *changed the use* of the parcels of land in question and instead of holding as a mere "private owner" are asserting and claiming, under color of authority of State laws and under an assertion of power from the State, that their use of the lands is a *public use* and constitutes a devotion of the lands to a public use and that *FOR THAT REASON the lands cannot be taken or appropriated by the plaintiff.*

This *change of use*, the assertion and exercise of such franchise, the erection and use of these structures, and the placing of these liens upon the land, all under color of the authority and approval of a public commission charged by law with jurisdiction in such matters, are obviously not the acts of mere private owners. The defendants may hold the land until condemned, and may use it for any *private* use they please; but when they attempt to use it for a public use and assert and claim that their use is a public use which defeats the right of the first locator to appropriate it, they invade, take and destroy the franchise of the first locator, the plaintiff. *And it is this invasion, taking and destruction which we here seek to enjoin.*

The plaintiff's grievance, in short, is that while it was proceeding with its condemnation suit the defendants came in as *subsequent purchasers with notice* and devoted the property to an alleged public use and now assert such devotion to an alleged public use as a bar to the plaintiff's right to condemn. This interference with the plaintiff's charter rights is a plain impairment and deprivation; and the only way in

which the impairment and deprivation can be stopped, the only way in which the Constitution can be enforced and made effective and the plaintiff made secure in the enjoyment of its Constitutional rights, is for this Court to *enjoin the interference, i. e.*, the defendants' use of the land for the alleged public use and their assertion and claim that their said use is a bar to the plaintiff's right to condemn.

More succinctly stated, the bill shows the plaintiff's possession of a State-granted franchise against which the defendants have set up a continuous interference under color of authority of State laws, which interference constitutes a cloud upon the plaintiff's title to its franchise and actually operates to destroy all effective use of the franchise; and in consequence thereof the plaintiff seeks an injunction forever restraining the defendants from asserting rights in derogation of the plaintiff's title to and use of its franchise. Continuing injury, removal of cloud on title, irreparable injury, *quia timet*, and other well-known heads of equity jurisdiction amply justify the resort to equity.

It is well settled in Ohio that the invasion of an intangible right or incorporeal hereditament, such as an easement or franchise, is *a taking of property* as much as the physical seizure and occupancy of another's house or bit of soil; and the owner of such easement or franchise is entitled to enjoin its invasion because it is a taking of his property, even though there be no actual entry upon any soil of which the owner of the franchise has or is entitled to actual possession.

Callen v. Electric Light Co., 66 Ohio
St. 166, 175, 177, 178;

Schaaf v. Railway Co., 66 Ohio St., 215;

Mansfield v. Balliett, 65 Ohio St. 451;

Hamilton G. & C. Traction Co. v.

Hamilton & L. El. Transit Co., 69 Ohio St. 402;

Kiser v. Commissioners, 85 Ohio St. 129.

It is apparent, too, from the facts alleged, that as the defendants purport to act under State statutes, State franchises, and State Utilities Commission orders, their acts are to be regarded as State action so as to make the controversy one involving a Federal question within the jurisdiction of the Federal courts.

Cuyohoga River Power Co. v. Akron, 240 U. S., 462, and cases there cited.

See, also, *Grand Trunk Railway v. Indiana R. R. Com.*, 221 U. S., 400, 403, which establishes that the Commission orders set forth in the bill are to be regarded as laws of the State, and 10 *Cyc.*, 226, and cases there cited, as establishing that the alleged incorporation of the Northern Ohio Power Company is an impairment of the plaintiff's contract.

The jurisdiction of equity to grant such injunctions was established in this court as long ago as the time of the decision in *Osborn v. United States Bank*, 9 Wheat. 738, 841, in which Chief Justice MARSHALL said.

“The appellants admit, that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But although the pre-

cise case may never have occurred, if the same principle applies, the same remedy ought to be afforded. *The interference of the court in this class of cases, has most frequently been to restrain a person from violating an exclusive privilege, by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the court rather strengthened than weakened? * * ** In this, and many other cases of continuing injuries, as in the case of repeated ejectments, a court of chancery will interpose. The injury done, by denying to the bank the exercise of its franchise in the State of Ohio, is as difficult to calculate as the injury done by participating in an exclusive privilege."

In the case of *The Binghamton Bridge*, 3 Wall. 51, this Court sustained the right to enjoin a rival corporation upon identically the same grounds that are invoked here. For a statement of that case we adopt the language of the court (pp. 71, 72):

"The plaintiffs in error brought a suit in equity in the Supreme Court in New York, alleging that they were created a corporation by the legislature of that State, on the first of April, 1808, to erect and maintain a bridge across the Chenango River, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a

grant in the nature of a contract that cannot be impaired. The complaint of the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the State, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the fifth of April, 1855, in plain violation of the contract of the State with them, authorized the defendants to build a bridge across the Chenango River within the prescribed limits, and that *the bridge is built and open for travel.*

"The bill seeks to obtain a *perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built*, on the sole ground that the statute of the State, which authorizes it, is repugnant to that provision of the Constitution of the United States, which says that no State shall pass any law impairing the obligation of contracts."

That case was approved and made the basis of decision in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S., 650, in which the plaintiff claimed to be entitled, for the term of fifty years from April 1, 1875, to the sole and exclusive privilege of manufacturing and distributing gas in the City of New Orleans. The right rested upon an act of the legislature. Subsequent to the granting of this right the defendant was formed *under a general law* and by an ordinance of the city it was authorized to supply light. The relief asked was a decree perpetually enjoining the defendant from laying its pipes for supplying

gas "and from asserting any right to do so until after the lapse of fifty years" from the date of the plaintiff's grant. The lower court sustained a demurrer to the bill, but its decree was here reversed, this Court holding that upon the facts alleged the plaintiff was entitled to an injunction.

The same conclusion was reached in *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, which was a bill by a Louisiana corporation to enjoin a citizen of Louisiana from supplying water in the City of New Orleans. Referring to the act authorizing the plaintiff to supply water in the city, the Court said (p. 681):

"It is as much a contract, within the meaning of the Constitution of the United States, as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point."

The right to an injunction in such cases as the present is recognized, also, in the numerous "location cases" cited in Point I *supra*. In this connection we again call particular attention to the able opinion of BARKER, J., in *Rochester, H. & L. R. R. Co., v. New York, L. E. & W. R. R. Co.*, 44 Hun, 206, and to the opinion of the New York Court of Appeals affirming that decision (110 N. Y., 128).

The right to an injunction in such cases was likewise affirmed by this Court in *Denver & Rio Grande R. R. Co. v. Arizona & Colorado R. R.*

Co., 233 U. S. 601. The opinion by Mr. Justice HOLMES in that case is so concise and disposes of the contentions of the appellant in such summary fashion that the importance of the decision is scarcely grasped at a single reading. We have examined the record and briefs in the case and from them it appears that the Denver & Rio Grande Company had

“acquired legal title to its line from all the land owners on the controverted line, some by deeds and conveyances, and some by condemnation proceedings”;

that it had actually constructed its road at a cost of over eight hundred thousand dollars and was actually operating the same and running trains thereon; that the Arizona & Colorado Company had done no more than locate its line and had,

“acquired absolutely no legal title to any land for its right of way”

except two very small parcels; that the Arizona & Colorado Company's line could have been changed at small cost; that there was,

“neither allegation nor proof of any inability on appellant's part to pay any damages which might possibly be incurred by appellee in consequence of any change in its surveyed line.”

And that as to a number of the points of conflict the Denver & Rio Grande R. R. Co. had acquired title to the land by deed prior to the institution of the suit. It was argued by the appellant in that case, just as it is argued by the defendants here, that the Arizona & Colorado Company's location gave it no rights with respect to the land in con-

troversy. Upon that subject it was said (page 62 of Appellant's Brief):

• • • "If a secret location can appropriate a man's land and prevent him from passing good title to another, then such embargo on the *jus dispone^{ndi}* detracts from the efficiency of his estate in the land and takes therefrom a valuable element, viz.: the power to sell it to whom he pleases. Hence the effect of that embargo upon him is directly repugnant to the constitutional inhibitions against taking property without just compensation and without due process of law. If he cannot find a purchaser during the continuance of such embargo, of what avail is his estate?"

Other statements found in the Brief are the following:

"Finally appellee's allied Arizona corporation has only built a few miles of road. The Colorado corporation has built none. Appellee itself, although nine years has expired has not moved a foot of earth nor laid a tie or rail. It has a mere naked paper railroad route, an imaginary railroad. It has never initiated the construction of a single mile of road anywhere in the entire Territory of New Mexico" (p. 69).

"The decree ousting appellant from the actual operation of a constructed railroad to establish a conjectural priority of a party who has incurred, but thus far has been fortunate enough to escape the enforcement of, a forfeiture of its rights is an anomaly. It puts the shadow above the substance. The real must give way to the

imaginary. The public good is the pole star and grand aim of all government. Yet under the decree here appealed from, the present necessities of appellant and the public which it serves and has been serving on this line for over eight years, must yield to remote and conjectural future needs of appellee" (p. 70).

"That it would subserve the public interest to permit appellant to continue the operation of its railroad either instead of or in addition to that of appellee, if appellee ever builds any, is a fact so obvious as to require no argument for its demonstration. Furthermore that course would obviate the enormous pecuniary loss to appellant of over \$830,000. The prospective use should yield to the more immediate necessity. The decree appealed from operates inequitably and contrary to the real justice of the case.

"Consideration of the relative convenience and inconvenience resulting from its decree, the contrast of the benefits and hardships entailed thereby, the balance of convenience, operate with persuasive and compelling force on the conscience of the Court. Those considerations suggest the impropriety of the decree appealed from" (pp. 76, 77).

The appellant in that case submitted also the following:

"POINT V.

"Appellee had an adequate remedy under the condemnation Statutes of New Mexico and that remedy was exclusive.

“Under section 3850, and those following it, of the New Mexico laws appellee could take lands for its right of way by the exercise of the power of eminent domain. If appellee had the prior right to take the lands in controversy, it could readily condemn them in the hands of appellant. That was its proper remedy.’

• • • • •

“POINT VII.

“Appellee had an adequate remedy at law by ejectment.

“All the powers vested in railroad companies to construct and operate their lines, enter upon lands and make surveys and acquire their rights of way, in the exercise of the power of eminent domain, are of statutory creation. The rights thereby conferred are purely legal rights.

“Plaintiff has never been in possession of the claimed right of way. The court below in its findings does not declare that such possession ever existed. This is a fatal defect in appellee’s case. Without possession, wrongfully interfered, there was no possible ground upon which to invoke the jurisdiction of a court of equity.

“On the other hand, the facts show that before this suit was begun appellant had entered upon the right of way and actually begun the construction of its road.

“Under these circumstances appellee had an adequate remedy at law.”

The Brief in that case concluded as follows:

"It is contrary to natural justice, as well as the public interests, for appellee to hold a right of way which it has not earned, and which it has let idle for nine years, and be permitted to thereby oust appellant, having the ability and will to serve the public and render the service afforded by appellant's constructed road. * * *

"We respectfully submit that the decree should be reversed."

Despite these arguments, ably presented by learned counsel, this Court promptly *affirmed* the decree. It specifically mentioned the various claims of the appellant, including the contentions that there was no irreparable injury or other ground for equitable relief and that the plaintiff had adequate remedies under the condemnation statutes and by ejectment (233 U. S., 602). It expressly affirmed the decision of the lower court that

"a company is entitled to protection as soon as its final location is complete."
and disposed of the other contentions as follows:

"The objections to equitable jurisdiction do not need separate discussion. The line is found to be the best line between the points and the plaintiff is entitled to it. It neither is to be forced into a compulsory sale nor to be remitted to legal or statutory remedies that rightly are thought to be inadequate by the local court"

The principle of the foregoing decisions is well stated in *Lewis on Eminent Domain*. In Section 215 of that work, in speaking of the question of what impairment of the value of a franchise or

interference with it exercise or enjoyment will amount to a taking, the author says:

“In so far as it is exclusive, it will be protected by the law. The exclusive right is property, which cannot be interfered with, except for public use and upon just compensation made. THE EXERCISE OF A RIVAL FRANCHISE WITHIN THE EXPRESS TERMS OF THE GRANT IS A TAKING, AND MAY BE ENJOINED UNLESS COMPENSATION IS PROVIDED. An act granting a franchise is a contract between the grantee and the State, and any subsequent act impairing its obligation is void.”

Again in section 917, he says:

“The grant of an exclusive right to maintain a bridge, ferry, railroad or canal, within certain limits, will be protected by injunction from infringement by rival or competing enterprises. Such infringement is a taking within the meaning of the constitution, for which compensation must be made.”

Of course, the plaintiff's franchise is not exclusive in the sense that the State may not grant a similar franchise to another company *in another location*, just as a railroad franchise is not exclusive in the sense that the State may not authorize the construction of another railroad; but the plaintiff's franchise is exclusive in the sense that the State may not grant another company a franchise to operate *in the same location*, just as every railroad is exclusive in the sense that no other railroad may occupy the same location. In short, in each case the franchise is ex-

clusive to the extent that two bodies cannot occupy the same place at the same time, or, as stated by LEWIS, "the exercise of a rival franchise *within the express terms of the grant* is a taking" which may be enjoined.

This principle being thus so well settled, *and having been so recently recognized and applied by this Court in a case of exactly this kind where the very arguments now advanced by the defendants were earnestly pressed upon the attention of the court and rejected by it*, it seems entirely unnecessary to go further. It may be well, however, to point out the peculiar and particular error which pervades the defendants' arguments. In their brief below they took the unique and anomalous position that because the bill shows an utter want of right or power on their part to destroy or interfere with the plaintiff's rights, the averments of the bill with respect to their assertions and claims to the contrary, the unconstitutionality of the legislation upon which those claims are based, and the threat and intent of the defendants to place additional structures and liens upon the land, are of *no materiality and need not be considered*, because, as they say, no claim which the defendants may make can "affect the facts admitted for the purposes of this motion or the law applicable thereto."

If that position were correct, no bill to remove a cloud upon title or to cancel an invalid deed or to enjoin any wrongful claim or threatened or continued invasion of a right, could ever been maintained, because it is always essential in such a bill to show a right in the plaintiff and a want of right in the defendant.

A recent case affording a complete answer to the contention is *Lancaster v. Kathleen Oil Co.*, 241

U. S., 551. In that case the bill alleged that the plaintiff had obtained an oil and gas mining lease of certain lands; that about two months later the lessor had made another lease of the same land to the defendant; that the defendant had entered into the lease with full knowledge of the prior lease to the plaintiffs, but that it had nevertheless gone into the lease with full knowledge of the prior lease and producing and selling oil and gas. It was also alleged that the plaintiff's lease was valid and that the subsequent lease to the defendant was void. The prayer was that the defendant be enjoined from entering on the land and from continuing to operate under its lease and from interfering in any manner with the plaintiffs in conducting operations under their lease *and from asserting or claiming any right to the oil and gas deposits under the land or the right to mine and remove the same*, and that the defendant company account to the plaintiffs for the gas and oil which it had removed. The defendants argued that the suit was the equivalent of an action at law in ejectment to recover possession of the leased premises; that in such a suit it is only necessary to allege a right of possession by the plaintiff and a wrongful possession by the defendant, and that *consequently the allegations concerning the lease to the plaintiff and the invalidity of the lease to the defendant were not material and should be disregarded*. This Court held, however, that the cause of action alleged in the bill was *not* the equivalent of a suit in ejectment,

“because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also *an injunction forever restraining the defendant company from asserting any*

rights under its lease and from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease and the effect to be given to such approval."

It was further urged by the defendant in that case that, if the bill be thus construed, then the suit was in substance one to quiet title and that such a suit can be brought only by one in possession. To that contention the Court responded:

"But this contention overlooks the reason upon which the rule is based, as pointed out in the cases relied upon, which is that one out of possession has an adequate remedy at law by a suit in ejectment. As it is conceded that the legal remedy was not here available, and that there was hence jurisdiction in a court of equity to determine the right of possession, it is clear that the rule has no application and that the court had equitable jurisdiction to determine all the issues presented by the bill."

"That the bill as thus construed states a cause of action within the jurisdiction of the court below as a Federal court is in substance conceded and is demonstrated by the ruling in *Wilson Cypress Co. v. Del Pozo*, 236 U. S., 635, 643-644.'

The authorities make it very clear, therefore, that the allegations in the present bill with re-

spect to the assertions and claims made by the defendant and the invalidity of those claims and assertions are most material and important. The main object of the present bill is to obtain an adjudication of the invalidity of those claims, and the prayer here, just as in *Lancaster v. Kathleen Oil Co.*, *supra*, is for an injunction restraining the defendants from interfering in any manner with the plaintiff's exercise of its franchise and from asserting or claiming any rights under the charter of the Northern Ohio Power Company and the various Commission orders set forth in the bill. It is obvious that the plaintiff could not bring an action in ejectment because the subject matter of the suit consists of intangible rights and franchises and not the mere possession of real estate. Therefore, it is clearly entitled to maintain a bill of quiet title.

The principle is clear.

“The allegations in the bill, so far as they seek to prevent a forfeiture of the water company's franchise, are certainly sufficient to entitle the complainant to relief in a court of equity; for, unless restrained by the courts, it is charged that the water company's franchise will be annulled and thereby its property, which is the principal security held for the benefit of complainant as the guarantor of the water company's bonds to the amount of \$2,000,000, made worthless. The numerous citations hereinbefore referred to, and which it is unnecessary here to repeat, are conclusive on this question, for they all hold that a court of equity has jurisdiction to prevent such wrongs if in violation of the

constitutional provisions. *The action of the city, even if void, is certainly a cloud upon the franchise of the water company.*"

American Waterworks & Guarantee Co. v. Home Water Co., 115 Fed., 171, 181, 182.

In the case at bar the defendants' acts and claims constitute, not only a cloud upon the plaintiff's title to its franchise, but, also, an active, present and permanent interference with its exercise; for they not only assert and claim a hostile right but also *act upon the claim* by building and using dams and power houses that constitute permanent structures upon a portion of the plaintiff's right of way.

Nor is it any answer to say that the present right of possession of the land is in the defendants. The mere possession or right of possession is wholly immaterial in this case.

An exceedingly pertinent authority upon this point is *Bass v. Metropolitan West Side El. R. Co.*, 82 Fed., 857 (C. C. A. Seventh Circuit), in which the railroad company was enjoined from using certain premises for railroad purposes *although it was lawfully in possession thereof as lessee*. The plaintiff had leased the land and by mesne assignments the railroad company had become the owner of the leasehold. After taking possession under the lease the railroad company removed a portion of the building because it interfered with certain of its railroad structures located in the street upon which the land abutted. The bill was for *an injunction against the occupation and use of the premises for railroad purposes* and it was held that the plaintiff was entitled to

such injunction. The controlling inquiry, as stated by the court, was

“whether the Metropolitan Company, which, it is not denied, has been in rightful possession, has appropriated or is about to appropriate any part of the leased premises to a corporate use which is not justified by the lease.”

The argument advanced by the defendant was that

“the railroad company, being the owner of the leasehold estate, and of the buildings upon the premises in question, and in possession of the same, has the right to devote all or any portion of the premises to railroad purposes without resorting to proceedings under the eminent domain act to acquire the interest of the lessor.”

As corollary or subordinate propositions, it was asserted that the plaintiff had not been damaged by the changes made in the building; that, in reality, the bill was one for specific performance, on which relief need not be granted as a matter of absolute right; that the railroad company had not violated any covenant of the lease; and that the alterations made in the building and the proposed construction and use of railroad tracks did not constitute waste. The court said that by consenting to the transfer of the leasehold to the railroad company the plaintiff undoubtedly consented “to any use of the property which was permitted to the original lessee” but it added that “it was not to be inferred that she thereby consented to *the particular use proposed.*” The court further stated that, if the question were sole-

ly one of waste already committed and there was "no appropriation of property to corporate use," it possibly would be proper to give weight to such equitable considerations as that the plaintiff's security was not impaired. It added, however,

"but when, as here, waste has been committed by removing a substantial part of a building which was intended to be a permanent structure, *for the purpose of making way perpetually or indefinitely for the track of a railroad*, the work of removal is not to be considered by itself, but *as a step in the execution of a scheme to take property for a corporate use without making compensation*, WHICH, AS ALREADY STATED THE COURT WILL ENJOIN, THOUGH THE RIGHT INVADED BE A PURELY LEGAL OR TECHNICAL ONE. Only in that way can the policy of the enactments against the taking of private property for corporate uses without compensation be fully vindicated; and without an order for the restoration of the building to its original form, or, a forfeiture of the lease, the relief would not be adequate or complete" (p. 863).

The Court further said:

"The demand of the appellant for *present relief* against the wrong done and intended is not met by the suggestion that, 'if the leasehold estate should be extinguished, of course the railroad company would be a trespasser, if it did not remove its girder.' The railroad company might abandon possession, leaving to the landlord the expense both of removing the girder and of reconstructing the torn down cor-

ner, with recourse for the outlay upon no responsible party; *but, more likely, the trespasser would surrender possession, if at all, only at the end of a litigation, to the expenses and contingencies of which the appellant or her successor in interest ought not, by judicial sanction, to be subjected.* The proposed occupation of the premises is shown to be necessary in order to overcome engineering difficulties which otherwise are practically insuperable, but, if it were only a matter of convenience, it would be equally evident that the occupation is intended to be, and will be, perpetual, as, doubtless, the public interest will require that it shall be. If, as was stated at the hearing, the charter of the present railroad company is limited to fifty years, that signifies only that from time to time, when necessary, new companies will be organized, to which, in succession, the road and its equipment will be transferred. *As against the lessor, such an occupation of her property is wrongful from the beginning.* The possessory right is in the lessee, and for that reason, it may be the railroad company, until the lease shall have ended by lapse of time or by forfeiture, cannot be dealt with as a trespasser; *but, that being so, it is the more important that the remedy here invoked should not be denied.* If the lease were for a short term, one year or ten, instead of ninety years, it would be evident that the railroad company has exceeded its privileges as tenant, and has invaded, appropriated, and injured present property rights of the landlord and reversion-

ary interests, which, without consent or proceedings to condemn, it had no right to take or injure" (p. 864).

With respect to the general right to an injunction in such cases, the court said (p. 860):

"It is not disputed that injunction is the proper remedy against the appropriation of land for the use of a public corporation which has not acquired a right to the proposed use either by purchase or by condemnation; and contrary to the general rule that equitable relief is granted only when equitable considerations require it, *the injunction in such cases may be, and perhaps more frequently than otherwise is, sought in vindication of a purely legal right; and, if the technical right and a threatened infraction of it be established, the relief will be granted without inquiry into the general equities of the case.* By this we do not mean that a specific equity, like an estoppel, may not be a defence to such a suit; but, if a complete defense be not shown, *the court will not refuse the relief on grounds of equitable discretion, as it might do in a suit for specific performance or rescission or other cause involving no special constitutional or statutory right of such a nature as to be capable of vindication or enforcement only by injunction.* 'In cases of this character,' said the Supreme Court of Illinois in *Cobb v. Coal Co.*, 68 Ill., 233, 'courts of equity have acted on broader principles (than in ordinary cases), and have adopted as a rule that an injunction will be granted to prevent a rail-

way company from exceeding the power granted in their charter. * * * *The courts do not require when the effort is manifested by a railway company to wrongfully appropriate private property, or force their structures to places not authorized, that there should be a want of remedy at law.*' And in *Lewis on Eminent Domain* (section 632), it is said, in substance, that the jurisdiction of equity in such cases may be placed upon the broad grounds that when the power of eminent domain has been delegated to public officers or others who are threatening to make an appropriation of private property to public uses in excess of the power granted, or without complying with the conditions on which the right to make the appropriation is given, *equity will prevent the threatened wrong 'without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation.'* "

Here then we have a specific illustration of the principle that a *change of use* of land may constitute a *taking*, and that where such is the case the right to an injunction is *absolute*, even though the party enjoined may be entitled to actual possession of the property for some other use which does not interfere with the plaintiff's rights. The decision is a specific rejection of the contention advanced by the defendants in this case that because the plaintiff may not now be entitled to actual physical possession of the land as against a mere private owner it follows that it is not entitled to enjoin the use which the defendants are

making of the land. As specifically stated by the court in that case, the defendants' occupation of the land for an asserted public use and its erection of the dams and power houses thereon was "*wrongful from the beginning*," and, if by reason of the possessory right of the defendants they cannot be now dealt with as actual trespassers "It is the more important that the remedy here invoked should not be denied." As further stated by the court, the demand of the plaintiff for present relief against the wrong done and intended is not met by the suggestion that when the plaintiff completes its condemnation proceedings, the defendants "must retire and lose the benefit of all the construction it has placed thereon at its own hazard." When that time comes, the defendants (paraphrasing the language of the court) might abandon possession leaving to the plaintiff the expense of removing the structures, or, more likely, the defendants would

"surrender possession, if at all, only at the end of the litigation, to the expenses and contingencies of which (plaintiff) ought not, by judicial sanction, to be subjected."

Still another fully sufficient answer to the contention that the plaintiff has an adequate remedy at law is the fact that *the suggested remedy, i. e., a condemnation proceeding, is available only in a State court*. For the settled rule is that, in order to defeat the equity jurisdiction of a Federal court, the legal remedy *must be one available in a Federal court*.

Landon v. Public Utilities Commission,
234 Fed., 152, at page 156; affirmed

as to this point 249 U. S., 236, at page 244.

To the same effect are:

Provisional Municipality of Pensacola v. Lehman, 57 Fed., 324 (C. C. A., 5th Circuit):

Smythe v. Ames, 169 U. S., 466, 516;

McConihay v. Wright, 121 U. S., 201, 206.

A familiar illustration of this principle is found in the cases holding that the concurrent jurisdiction of Federal Courts of equity with respect to claims against decedents' estates is not defeated by the existence of State statutes affording a remedy in the State probate courts even though such statutes purport to make the remedy in the State courts exclusive.

Lawrence v. Nelson, 143 U. S., 215;

Security Trust Company v. Black River National Bank, 187 U. S., 211;

Waterman v. Canal-Louisiana Bank, 215 U. S., 633.

Indeed, it is a well settled principle that the jurisdiction of the Federal courts is wholly independent of State action and is therefore

“ a power which the States may not by any exercise of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious.”

Harrison v. St. Louis & San Francisco R. R. Co., 232 U. S., 318, 328.

Consequently, as by the principles of equity jurisprudence as recognized in the Federal

courts, the plaintiff in this case is entitled to sue in equity, such right is not in any way defeated or impaired by the assumed existence of a legal remedy available only in a State court.

It is settled too, that

“it is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration as a remedy in equity.”

Payne v. Hook, 7 Wall., 426, 430;
Walla Walla v. Walla Walla Water Co.,
 172 U. S., 1, 12.

In *Cleveland City Railway Co. v. Cleveland*, 94 Fed., 385 (affirmed 194 U. S., 517) Judge RICKS said:

“That a bill in equity seeking a judicial decree declaring an ordinance which impairs the contract rights of the plaintiff or takes from him or it property without due process of law is a proper remedy, has been specifically determined by the Supreme Court. Citing cases.”

It is also established that

“where * * * the damage * * * is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction.”

Walla Walla v. Walla Walla Water Co.,
 172 U. S., 1, 12.

That a condemnation proceeding is not an adequate remedy in this case is in fact demonstrated by *Cuyahoga River Power Company v. Northern*

Realty Co., 244 U. S., 300. The State Court may continue *ad infinitum* to do precisely the same thing it did in that case, *viz.*, dismiss the condemnation proceeding in such way as to make it impossible to say whether its judgment is rested upon State questions or upon the Federal questions arising out of the Traction Company's claim that its own use of the land prevents the plaintiff from acquiring it, *and thereby deprive the plaintiff of any opportunity to obtain an adjudication by this court with respect to its constitutional rights.*

The decree should be reversed with costs.

Respectfully submitted,
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November, 1919.

FILED

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JAMES D. MAHER

CLERK

Supreme Court of the United States

October Term, 1919

No. 102

THE CUYAHOGA RIVER POWER COMPANY

Appellant

against

THE NORTHERN OHIO TRACTION AND LIGHT COM-
PANY and THE NORTHERN OHIO POWER COMPANY

Appellees

APPELLANT'S REPLY BRIEF

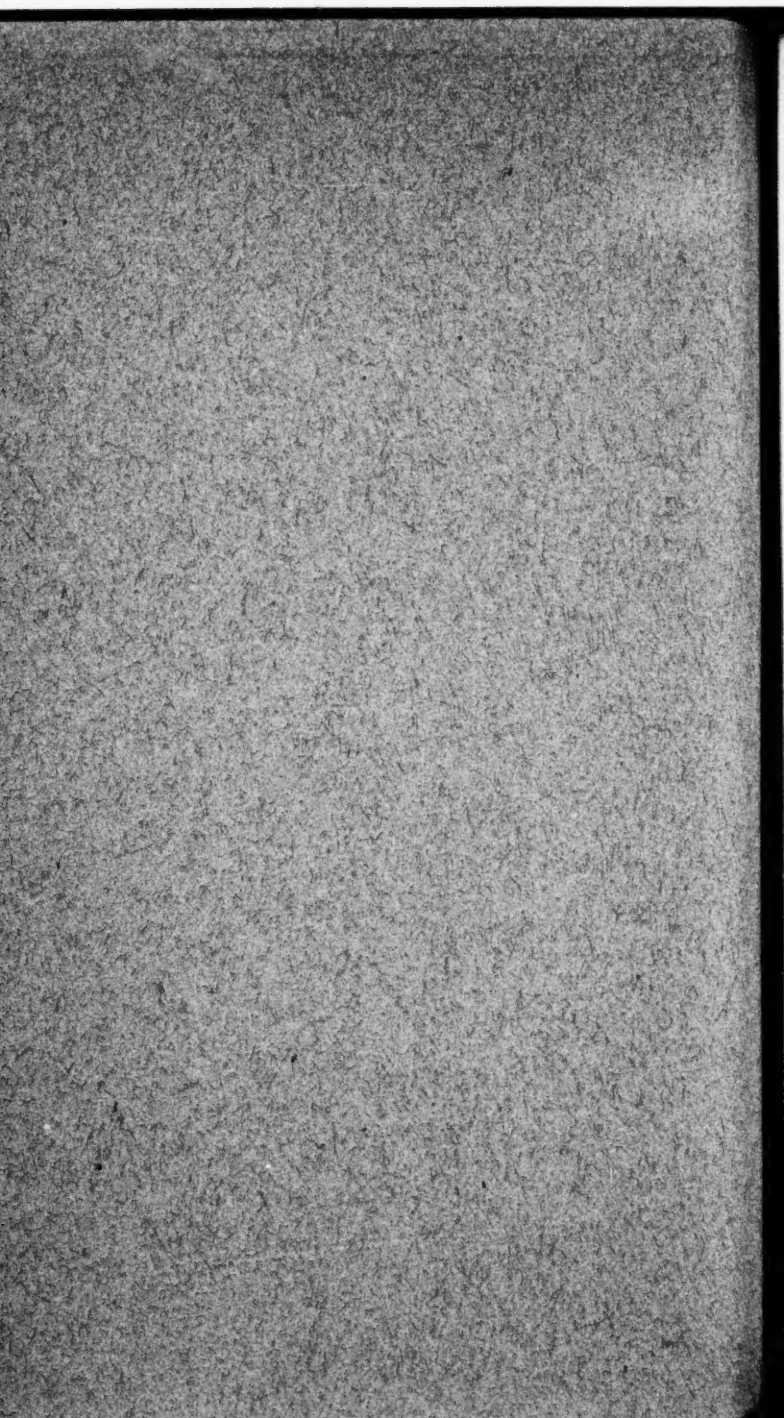
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Supreme Court of the United States

OCTOBER TERM—1919

THE CUYAHOGA RIVER POWER
COMPANY,

Appellant,

against

THE NORTHERN OHIO TRACTION
AND LIGHT COMPANY and THE
NORTHERN OHIO POWER COM-
PANY,

Appellees.

No. 102.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF OHIO, EAST-
ERN DIVISION.

APPELLANT'S REPLY BRIEF

The appellees have filed a brief and also a supplemental brief. The former contains their principal contentions, and our references, unless otherwise noted, are to it and not to the supplemental brief.

I

The question of jurisdiction suggested at page 18 of the Supplemental Brief, is definitely disposed of by *Cuyahoga River Power Co. v. Akron*,

240 U. S., 462. True, the defendants here are not *municipal* corporations, but that is immaterial.

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650;

New Orleans Waterworks Co. v. Rivers, 115 U. S. 674;

St. Tammany's Waterworks v. New Orleans Water Works, 120 U. S. 64.

Each of those cases arose upon a bill in equity in the Federal Court to enjoin the invasion of a franchise.* In two of them the defendant was a purely private corporation (*i. e.*, not a municipal corporation) and in the other the defendant was *an individual*. In each case the parties on both sides were citizens of the same state (Louisiana), and in each case an injunction was awarded because the defendants, acting under color of State laws, were taking steps that interfered with the plaintiffs' franchises.

See, also, page 58 of our first brief.

II

The appellees concede the general doctrine that priority of location gives priority of right as against rival companies (Brief, p. 18; Supp. Brief, pp. 14, 15).

They say this "would not seem to be the law in Ohio" and refer, pages 18, 19, to the opinion of Mr. Justice CLARKE, as District Judge, in *Sears v. Akron*. We dealt with that opinion at pages 25 to 46 of our first brief and, as we respectfully submit, demonstrated that the doctrine *does* and *must* prevail in Ohio, *and, also, that it*

* The case first cited was originally brought in a State court, but it was then removed to the Federal Court upon the ground that it was a case arising under the Constitution of the United States (115 U. S., 651).

has been expressly recognized in that State. As to the latter proposition see page 22 of our first brief. The appellees have not answered our argument. Further discussion upon that point thus seems unnecessary, except to point out that the Ohio statute giving condemning corporations the right to abandon an appropriation proceeding (*Code*, §11060, cited by the Court below and quoted at page 21 of the appellees' brief) has not been construed in Ohio as authorizing either a change of a location once adopted or an abandonment of the enterprise. See pages 34-41, 42-46 of our first brief, and *Adena R. R. Co. v. Public Service Commission*, 92 Ohio St. 1, *Hocking Valley Ry. Co. v. Public Utilities Commission*, 92 Ohio St. 9, *Kanawha & M. Ry. Co. v. Public Utilities Commission*, 96 Ohio St. 414, 429. In those cases the Supreme Court of Ohio expressly held that by incorporation under the general laws of that State a public service corporation assumes an obligation to perform duties for the benefit of the public and cannot absolve itself from that obligation, and that the State has the right to compel the corporation to perform them. See *infra*, pages 30-32.

III

The real ground of the appellees' argument is that the doctrine that priority of location gives priority of right is limited to cases between *rival companies* and has no application to the case at at bar *because the defendants here are holding the land "in a purely private capacity"* (Brief, p. 22; and paragraphs 4 and 6 at pp. 15, 16 of Supp. Brief).

That contention is based solely and exclusively upon the averment in paragraph Sixteenth of the bill that the defendant Traction Company has no corporate authority or franchise to exercise the power of eminent domain for the purpose of acquiring power houses or the lands necessary therefor, and that the Traction Company's use of the land is *a private use and not a public use* (Rec., p. 9). The appellees say that that is an averment of *fact*, admitted by the motion to dismiss and binding upon the plaintiff, and from it they draw the inference that this is a suit, not between rival public utility corporations, but a suit by one public utility corporation against a private owner.

That position, we submit, is a naked refusal to discuss the case made by the bill because it pays no attention to the other allegations.

Inasmuch as the question whether a use is public or private is a judicial question upon which this Court can even reverse the State Courts (*O'Neill v. Leamer*, 239 U. S. 244, 249; *Union Lime Co. v. Chicago, &c. Co.*, 233 U. S. 211, 218), it seems quite plain that the averment in the bill that the use of the Traction Company is a private use is a conclusion of law and not the averment

of a fact, and the bill emphatically shows that both the appellees were organized as public utility corporations and that the Traction Company is operating as such. Aside from that, however, the bill shows that, although the Traction Company itself had no power of eminent domain (and hence, according to the views of the pleader, its use was private and not public), it has acquired, by virtue of orders of the Public Utilities Commission, the rights and franchises of the Northern Ohio Power Company, which was incorporated under the statute under which the plaintiff was organized and obviously did have the power of eminent domain. If the organization of the Northern Ohio Power Company and the transfer of its property and franchises to the Traction Company be valid, then the Traction Company's own lack of the power of eminent domain is supplied by its possession of the franchises of the Northern Ohio Power Company and the use is public; and *the allegation in paragraph Sixteenth of the bill that the Traction Company's use was private is based upon the other allegations of the bill that the organization of the Northern Ohio Power Company and the transfer of its franchises to the Traction Company are null and void as to the plaintiff*. That, certainly, is what the pleader meant, and it is, we submit, the reasonable intendment of the bill; and it is not permissible for the appellees to pick out the one allegation of private use and ignore the other allegations which show its meaning.

Every bill to enjoin any invasion of any right necessarily avers that the defendant is acting contrary to or in excess of its rights, and it is because the defendant persists in doing what it has no right to do that the injunction is sought. So,

in this case, the bill properly shows that the defendants have "no rights in the property other than those of a private owner" (Appellees' Brief, p. 23), and it is the fact that they are *asserting and exercising other rights* (i. e., the purported powers and franchises of the Northern Ohio Power Company) which is the occasion for this suit. See page 68 of our first brief.

The appellees contend that the averments that the Traction Company claims and asserts that the property has been devoted by it to a public use and therefore cannot be taken from it by the plaintiff "amount to nothing in the face of the plain allegations of the bill that the Traction Company has no right of eminent domain as respects the land in question and that its use thereof is entirely private" (Brief, pp. 22, 23). If the bill rested upon a *mere verbal assertion* of such a claim on the part of the Traction Company, unsupported by any color of State authority and without any action being taken upon the basis of that assertion, the contention might have some merit. But attention must be paid to the other allegations of the bill. The Traction Company not only makes that oral assertion but it also acts upon that assertion by building power houses and generating electricity and pleading its alleged devotion of the lands to a public use as a bar to plaintiff's appropriation of the land, and as color of authority for its claims it has the apparently valid charter of the Northern Ohio Power Company and the apparently valid orders of the Public Service Commission set forth in the bill. Under such circumstances, the fact that that charter and those orders do not actually authorize its acts and assertions and that, on the contrary, its acts and assertions are wholly wrongful, does not de-

feat the plaintiff's right to relief. See, *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, and *Cuyahoga River Power Co. v. Akron*, 240 U. S. 462.

In their brief in this Court the appellees become exceedingly magnanimous—asserting that they are simply private owners like John Smith (p. 23), that they have no broader or better right to the land than such as would be acquired by an ordinary deed from any private owner (p. 44), that they hold their title “subject to and at the hazard of all the rights acquired by the plaintiff” (p. 45), that their use does not affect the plaintiff's right to acquire the land (p. 28), and that when the plaintiff completes a condemnation proceeding “they must retire and lose the benefit of all the construction (they) have placed thereon at (their) own hazard (p. 45). And they close with what amounts to a challenge to the plaintiff to go ahead and condemn the land (p. 47). To the same effect is paragraph 4 at page 15 of their Supplemental Brief.

But in other cases and outside the portals of this Court the attitude of the appellees is quite different. We know from the opinion of this Court in *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, as well as from the bill in this case, that when the plaintiff sought to condemn the land the Traction Company “resisted the taking on the ground that a condemnation of the land under the petition of the (plaintiff) would be inconsistent with and destructive of the public use to which the land had been applied by the Traction Company” (pp. 301, 302). And the plaintiff knows full well that if it should accept the challenge thrown down in the concluding paragraph of the appellees' brief, it would be met

with the same claim again. The plaintiff does not fear that "the facts claimed by it are not true" or that "its legal theories are untenable." On the contrary, having failed, in the case just cited, to obtain a decision of this Court as to the validity of the Traction Company's claim of devotion to public use as a bar to the plaintiff's right to condemn the property, because the State Court made its decision in such ambiguous form as to make it impossible for this Court to tell upon what ground the decision of the State Court was based, the plaintiff now comes to this Court again for the purpose of obtaining its decision upon that precise point.

We make no secret of the fact that after the rendition of the decision of the State Court in condemnation case the present suit was commenced because of a fear that this Court might do precisely what it subsequently did do in *Cuyahoga River Power Co. v. Northern Realty Co.*, *supra*, i. e., dismiss the writ of error because the record made it "impossible to say" what the State Court had decided. Surely it was very right and proper for the plaintiff, in view of the fact that the State Court had dismissed its condemnation proceeding without giving any reason for its action and had thus deprived this Court of jurisdiction to review that case, to assert its constitutional rights by means of a bill in equity in the courts established for the very purpose of determining constitutional controversies. *

*This court's "stinted jurisdiction" on writs of error to State Courts seems to have led Webster, at Mr. Justice Story's suggestion, to adopt a similar policy in the Dartmouth College Controversy. See Beveridge, *Life of John Marshall*, Vol. IV pp. 251, 252.

As pointed out at page 81 of our first brief, if the plaintiff should commence another condemnation suit the State Court might do precisely the same thing it did in the first suit. *It is for this reason that before commencing such second suit the plaintiff desires to enjoin the appellees from asserting that they have devoted the property to a public use and thereby defeated the plaintiff's right to condemn it.* When armed with such an injunction, the plaintiff will be enabled to go into the State Court and prove (a) its corporate existence, (b) its right to make the appropriation, (3) its inability to agree as to the compensation to be paid, and (d) the necessity for the appropriation (Ohio Code, §§11039, 11046), without the danger of having to submit to the judgment of the State Court upon constitutional questions which it is the pre-eminent function of this Court to determine.

We ask the Court to keep in mind the practical situation with which the plaintiff is confronted. Having adopted a plan locating its proposed improvement upon specifically described parcels of land, it proceeded to condemn those lands. As to the "keystones," so to speak, it was met with the claim that a subsequent sale of the land to public utility corporations and their use of the land for power-development purposes had defeated its right to acquire them. That claim presented the question whether the plaintiff had a property right in its perfected location which could constitutionally be taken away from it by such subsequent sale to a rival corporation. Such question was undoubtedly involved in the condemnation proceeding which the plaintiff had instituted. The State Court, however, rendered its decision in a form which, this Court has said, *makes*

it impossible to tell whether that question was decided or not (244 U. S. 300, 304). Confronted with that form of decision by the State Court, and fearing that this Court might (as it subsequently did) decline to review the case because of the ambiguity in the State Court's decision, the plaintiff sued in the Federal Court to enjoin the public utility corporations which had thus purchased the land from asserting that their alleged devotion of the land to a public use is a bar to the plaintiff's right to condemn. Such suit again presents the question above stated, as to whether the plaintiff has a property right in its perfected location which can constitutionally be taken away from it by such subsequent sale to a rival corporation. That question we now ask this Court to determine in order that the plaintiff may be free to prosecute a condemnation proceeding in the State Court without there being interjected into the case this federal question as to whether the plaintiff's right to condemn the land is barred by the subsequent purchase of the land by the appellees and their alleged devotion of it to a public use.

No one can say that that federal question has been decided adversely to the plaintiff, nor can any one say which, *if any*, of the four "preliminary questions" involved in the first condemnation proceeding have been decided adversely to it (*Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300). And in view of that fact, the entire question is open for decision.

It is true that in their Supplemental Brief the appellees, upon the authority of the decision in the prior condemnation proceeding, urge that the plaintiff's right of condemnation has been denied by a Court of competent jurisdiction (Supp.

Brief, pp. 2, 15) or at least has been made so doubtful that a Court of Equity will not protect it (par. 3 at p. 15). But the same counsel who now makes this assertion there argued, strenuously and successfully, that the record in that case left it in doubt what point had been there passed upon. Upon that argument he secured a dismissal of the case by this Court for want of jurisdiction. Certainly he cannot now be heard to assert that the decision in that case constitutes an adjudication against any right now claimed by the plaintiff. And whether he asserts it or not, it is clearly demonstrated to be untrue by this Court's own statement that it is *impossible to say* what was decided in that case.

What we have already said is sufficient, too, to show that we are not endeavoring to make the present suit a *substitute* for a condemnation proceeding and are *not* endeavoring to acquire the land in question through a receiver, as repeatedly suggested by the appellees.

IV

Pages 24 to 36 of the appellees' brief, as we understand them, assert these propositions:

(1) The appellees' use of the land is not an actual present interference with or invasion of any right or franchise of the plaintiff, and hence the only possible theory upon which the bill can be sustained is that the appellees' assertions as to the character of their use justify a suit to quiet title. See, particularly, pages 25 and 30.

(2) The bill cannot be sustained as a suit to quiet *title to land* because such a suit can be brought "only by one in possession and being

either the owner of lands or having some actual interest therein," and in this case the plaintiff has neither the title to nor the possession or right of possession of the land. See page 26.

(3) The bill cannot be sustained as a suit to quiet *title to the plaintiff's franchise rights* because (a) such a suit would be an anomaly, (b) "no one is now interfering with the exercise of the franchise," (c) a mere adjudication of the validity of the plaintiff's franchise would be nothing more than the decision of a moot or academic question, (d) the bill seeks to do more than merely quiet title. See pages 33 and 36.

We answer the propositions seriatim:

As to (1): The assertion that the appellees' use of the land is not an actual present interference with or invasion of any right or franchise of the plaintiff, repeated *ad nauseam* throughout the appellees' brief, is but an idle formula of words based upon the wholly unwarranted meaning attributed to the averment of "private use" found in paragraph Sixteenth of the bill. The inescapable fact is that the Northern Ohio Power Company obtained a franchise similar to the plaintiff's *and with a conflicting location*, and the Traction Company bought it and is now using it. Common sense, as well as authority, tells us that this actual present exercise of this rival franchise within the express limits of the plaintiff's location is an actual present interference with the plaintiff's franchise. It is so recognized in all the cases asserting the priority of location doctrine. See, particularly, *Denver & Rio Grande R. R. Co. v. Arizona & Colorado R. R. Co.*, 233 U. S. 601, and the *Rochester Railroad* case cited at pages 17 and 61 of our first brief. See, also pages 52-54 of our first brief.

It is, in fact, a *taking* of the plaintiff's property right in its perfected location by an unlawful exercise of the power of eminent domain (See *infra*, pages 21-27), and thus constitutes, in itself, "an independent head of equity jurisdiction": and "injunction, in this class of cases, is a matter of strict right, not of equitable discretion."

Pomeroy, Equitable Remedies, Sec. 465 (1919 Edition, Sec. 1879);
Lewis, Eminent Domain, 3d, Ed., Secs. 901, 902.

See, also, last paragraph on page 57 our first brief and cases there cited.

The appellees themselves distinctly admit this at page 27 of their brief, where they say:

"So in the cases of wrongful taking or appropriation of lands by a railroad company or other corporation from an owner, the existence of legal remedies by way of a suit for damages or a suit to compel appropriation *will not preclude the owner from resorting to equity to enjoin such wrongful invasion.*"

The same rule must apply to franchise rights as well as to lands, and if, as we shall demonstrate at pages 21-27, *infra*, the appellee's acts constitute a wrongful taking of the plaintiff's property right in its perfected location, it necessarily follows, even upon the appellee's own admission, that the plaintiff's right to equitable relief is clear.

As to (2): The rule that a suit to remove a cloud or to quiet title can be maintained only by one in possession is not inflexible. It is not itself a principle of equity jurisdiction but merely an application of the principle that equity will not ordi-

narily interfere where there is an adequate remedy at law, and it is stated as a "rule" simply because one out of possession of land generally has an adequate remedy by ejectment (*Pomeroy Equitable Remedies*, Sec. 728, 1919 Ed. Sec. 2150; *Lancaster v. Kathleen Oil Co.*, 241 U. S. 551, 554, 555. See pages 68 to 71 of our first brief.) When the legal remedy is not available, the suit may be brought in equity even by one out of possession (*Lancaster v. Kathleen Oil Co.*, *supra*, at page 555).

Furthermore, while the plaintiff is not in possession of the *land* and has no "title" thereto in the sense in which that word is used in real estate conveyancing, it certainly has "some actual interest therein" by reason of its right to acquire it and use it in its enterprise. Certainly, too, the plaintiff is "in possession" of that interest, and it is its title to *that interest* from which the plaintiff seeks to remove a cloud.

As to (3): (a) No reason is suggested why a suit to quiet title to a franchise or remove a cloud therefrom is any more anomalous than a suit to remove a cloud or quiet title to land. Franchises are real estate, being a class of incorporeal hereditament (2 *Washburn, Real Property*, 5 ed. p. 303; *Joyce, Franchises*, Sec. 26). But even if they were not, they certainly are *property*, and there is no reason why title to any kind of property should not be quieted or a cloud removed therefrom by suit in equity (*Pomeroy, Equitable Remedies*, Sec. 729, 1919 Edition Sec. 2151; *Voss v. Murray*, 50 Ohio St. 19, 28; *Thompson v. Emmett Irr. Dist.*, 227 Fed. 560, 564, C. C. A. 9th Circuit).

(b) We have shown already that the appellees are now actually interfering with the plaintiff's

franchise, both from a practical standpoint and in contemplation of law. See (1) above and pages 52, 53, 61-68 of our first brief.

(c) Even if the relief to be afforded in this case can extend no further than to enjoin the appellees from asserting that their alleged devotion of the land in question to a public use defeats the plaintiff's right to condemn it, the case is certainly neither moot nor academic. The controversy between the parties is very real and genuine, and important property rights depend upon the determination. The situation is not different from that presented in the *Rochester Railroad case* cited at pages 17 and 61 of our first brief, nor from that presented in the *Denver & Rio Grande case* in this court (233 U. S. 601). In each of those cases the plaintiff had merely a located route and was under the necessity of condemning the land before it could take possession. In each of them the defendant had acquired the title and taken possession. Yet in each case the right to an injunction was sustained.

(d) Even if it were true that the bill asks for more relief than can be granted in this case, manifestly that is no reason for dismissing the bill or refusing to grant that portion of the relief to which the plaintiff is entitled.

In short, the propositions urged by the appellees here are the precise duplicate of the contentions pressed upon the Court in the *Denver & Rio Grande case*. At pages 61 to 66 of our first brief we have taken pains to show this by quotations from the record and briefs in that case. In that case, as in this, it was contended that there was an adequate remedy under the condemnation statute, the contention being stated substantially

in the language of the appellees here. See, particularly quotations at pages 64 and 65 of our first brief. Yet this Court, in that case, affirmed a decree awarding an injunction. It expressly stated that the plaintiff was *not* to be

“remitted to legal or statutory remedies that *rightly are thought to be inadequate* by the local Court.”

In their briefs here the appellees do not mention that decision of this Court. No attempt is made to distinguish that case from this. No possible difference between the two cases is suggested; and we think it not too much to say that the appellees' failure to mention that case in their briefs is an admission that that decision is controlling here.

V

At page 29 of their brief the appellees interject this rather unique argument: In *Sears v. Akron*, 246 U. S. 242, the bill alleged that the acts of the City of Akron made it impossible for the plaintiff to carry on its enterprise; the City's acts were upheld in that case and the bill dismissed, and hence the plaintiff cannot go ahead with its enterprise: therefore, nothing that the appellees in this case are doing can really hurt the plaintiff.

The same idea is suggested in paragraph 2 at page 15 of their Supplemental Brief as a reason why the bill in this case should be dismissed.

Waiving the question whether the appellees could establish a right to proceed with their own wrongdoing by saying that some other wrongdoer has already dealt a deathblow to the plaintiff, we make this answer to the argument: The

allegations of the bill in *Sears v. Akron* were based upon the fact that the City's ordinance declared that the City thereby appropriated *all the waters of the Cuyahoga River* above a certain point. If the City should actually take what its ordinance said it would take, the plaintiff's enterprise unquestionably would be destroyed, and one of the points urged in that case was that the City was taking ten times as much water as it can legitimately use (246 U. S. 251). Thus far the City has not taken anywhere near the quantity its ordinance stated it was going to take, and in view of that fact the plaintiff is taking comfort in the suggestion thrown out in the opinion of this Court, at page 253, that it may prove that the City's diversion will not be such as will substantially affect the plaintiff's use. Of course, every drop of water which the City diverts lessens the amount available for the plaintiff and actually, presently, and permanently lessens the value of the plaintiff's enterprise by just that much, and it was because of that fact that the plaintiff conceived itself entitled to enjoin the City's diversion. But the fact that this Court has decreed in that case that the plaintiff must suffer a partial loss does not justify the appellees in inflicting upon the plaintiff a further and greater injury.

VI

It seems to us, from pages 36 to 38 of their brief, that the appellees have genuinely misunderstood our contention (our Brief, pp. 55 and 78) that even if a condemnation proceeding be an adequate remedy it does not prevent resort to a federal court of equity because such remedy is

available only in a State Court. We consequently desire to restate our position.

It is of course manifest that the mere fact that a legal remedy is available only in a State Court because the requisites of federal jurisdiction are lacking is not itself a basis of federal jurisdiction. To assert the contrary would be equivalent to saying that the lack of federal jurisdiction is a justification for its exercise. But where, as here, federal jurisdiction exists because of the presence of a federal question, and the point to be decided is whether the subject-matter of that federal jurisdiction is cognizable in equity because of the inadequacy of legal remedies, the fact that there is a legal remedy that *by its very nature* is available only in a State Court is not to be taken into consideration. Under such circumstances, the point is to be decided precisely as if the legal remedy in the State Court did not exist. And that is but another way of saying that a party entitled to sue in the federal courts because a federal question is involved (or because the controversy is between citizens of different States) is not to be denied access to the federal courts simply because the State has provided a legal remedy in its own tribunals.

In other words, the inadequacy of legal remedies is itself a ground for equitable relief (*Pomeroy, Equity Jurisdiction*, 4 ed., 1918, Sec. 217). And in determining in any given case whether or not there is that lack of legal remedies which affords a basis for the interposition of equity, the federal courts inquire what legal remedies exist which, given the ordinary essentials of federal jurisdiction, can be availed of in a federal court. If they find that the only legal remedy is one which can not be asserted in a federal court

even though the ordinary essentials of federal jurisdiction exist, *e. g.* even though the controversy be one involving a federal question or is one between citizens of different states, they refuse to withhold the relief accorded by the principles of equity.

These, it seems to us, are indisputably the views expressed in the cases cited at pages 78 and 79 of our first brief. The same view, it seems to us, is necessarily involved in Equity Rule 22*, for otherwise it would be impossible to comply with the rule in many cases. A federal court in which a suit had been commenced in equity which should have been brought at law obviously could not transfer the suit to a State Court.

VII

At pages 38 to 43 of their brief, the appellees seek to show that the plaintiff's right to equitable relief is barred by *laches*. There seems to have been a studied effort to avoid giving that label to the contention, but that is what it amounts to, and it is so designated in paragraph 7 at page 17 of the Supplemental Brief, where the contention is reiterated. The assertion is that, even assuming that the plaintiff might have enjoined the construction of the power plants in 1911 when their construction was commenced, it cannot have equitable relief under a bill filed in 1916 because it "stood by" and saw these improvements go forward.

*Equity Rule 22: "If at any time it appear that a suit commenced in equity should have been brought on the law side of the Court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

The conclusive answer to this contention is found in the recent decision of this Court in *Southern Pacific Co. v. Bogert*, 250 U. S. 483, in which this Court reiterated the rule that *laches* is not merely lapse of time, and that to constitute laches it is essential that there be also "acquiescence in the alleged wrong or lack of diligence in seeking a remedy" (pp. 488, 489). In that case 22 years elapsed between the commission of the wrong complained of and the commencement of the suit in which a recovery was sustained. In the *interim*, there had been "rare pertinacity" in the "diligent pursuit of remedy" and despite the fact that the appropriate remedy was well known it was held that this long continued failure to discover it did not to constitute laches.

In the case at bar, there can be no pretense of any acquiescence on the part of the plaintiff or of any lack of diligence in seeking a remedy. On the contrary, the plaintiff was actively asserting its right to the land in question and seeking to acquire it at the very time the defendant Northern Ohio Power Company was organized and at the time that it and its co-defendant the Traction Company purchased the lands and commenced the erection of the power plants. Those steps, *viz.*, the organization of the Northern Ohio Power Company, the purchase of the land, and the erection of the power plants, were all taken *with notice and actual knowledge of the plaintiff's rights and during the pendency of the condemnation proceeding by which the plaintiff was seeking to acquire the land*—a proceeding which the appellees now gravely argue is adequate and exclusive (See, particularly, Bill par. 13, Rec. p. 6).

In view of these facts, expressly admitted by the motion to dismiss, it is the quintessence of

irony to say that the plaintiff has "stood by" or has acquiesced in the defendant's doings or has lost any rights by so-called *laches*. The fact that the condemnation proceeding has proved inadequate and unavailing and this suit was not brought until the decision of the highest State Court in the prior suit rendered it probable that it would be unavailing, is clearly immaterial in view of the decision of this Court in *Southern Pacific Co. v. Bogert, supra*.

The appellees bought and built during the pendency of the plaintiff's proceedings to acquire the land and with notice of all the plaintiff's rights and claims, and hence to their charge of *laches* on the part of the plaintiff we answer in the language of Mr. Justice HOLMES in *Denver & Rio Grande R. R. v. Arizona & Colorado R. R.*, 233 U. S. 601, 604.

"The defendant has gone ahead since the suit was begun, but of course has acquired no new rights by doing so."

VIII

We said at page 13, *ante*, that the appellees' exercise of a rival franchise within the express limits of the plaintiff's location is a *taking* of the plaintiff's property right in that location by an unlawful exercise of the power of eminent domain. In order not to interrupt the continuity of the argument in the course of which that statement was made, we did not then stop to demonstrate the point. We hence return to the subject here.

If the appellees had acquired their title to the land by condemnation rather than by contract,

the true character of their alleged devotion of it to a public use as *an exertion of the legislative power of eminent domain* would have been clearly apparent. The circumstance that it happened to be unnecessary for them to resort to an adversary proceeding against a hostile owner in order to acquire title to the soil does not change the character of their act, and cannot obliterate the fact that their act is, inherently and essentially, an exercise of that legislative power.

If the land, in the condition it stood at the time the plaintiff's location was made, were subject to the plaintiff's right to acquire it—if the plaintiff then possessed a *right* to acquire it—then any act which defeats or even substantially interferes with that *right* is a "taking" of the plaintiff's property, *i. e.*, a "taking" of that *right*.

Callen v. Electric Light Co., 66 Ohio St. 166, 177;

Mansfield v. Balliett, 65 Ohio St. 451, 464, 476;

Pumpelly v. Green Bay Co., 13 Wall., 166, 177;

Lewis, Eminent Domain, §§63, 64, 65.

It is, moreover, a fundamental principle that the devotion of property to a public use is a governmental function, a prerogative of sovereignty, and can be accomplished only by the State or some instrumentality of the State exercising delegated legislative authority. It is, in short, an exercise of the legislative power of eminent domain even though the corporation making the devotion be able to acquire the title of the private owner by contract or agreement without the necessity of a formal appropriation proceeding.

This has been squarely ruled by the Supreme

Court of Ohio in two cases in which the devotion to railroad uses of lands *purchased* by railroad companies was held to be an exercise of the power of eminent domain.

Doan v. Cleveland Short Line Ry. Co.,
92 Ohio St. 461, 112 N. E. 505;

Ward v. Cleveland Ry. Co., 92 Ohio
St. 471; 112 N. E. 507.

In each of those cases the plaintiffs were owners of certain lots which had been laid out upon a uniform plan and sold with the restriction that they should be used exclusively for residence purposes. The defendants had *purchased* certain other of the lots with knowledge of these restrictions, but, in disregard thereof, were proceeding to use them for railroad purposes. In each case the plaintiffs urged that such use by the defendants of its own lots constituted a violation of the restrictions. In the opinion in the *Doan* case the courts stated that such restrictive covenants are recognized and given full force and effect between private owners of lots and that such private owners could be enjoined from using the lots for other purposes. But it then said:

“The case at bar, however, is one at law, in which plaintiff seeks to recover compensation by way of damages resulting from the taking of an alleged property right which she claims to have had in the lots of the defendant, a railroad company organized under the laws of the State and *possessing the right of eminent domain*. It is *the owner of a number of lots in the allotment and at the time of the commencement of this action was building a railroad on and over its property*. IT WAS DEVOTING THESE LOTS TO A PUBLIC USE. If plaintiff is entitled to compensation by way of dam-

ages by reason of the use of this property by the railroad company, a right must grow out of the covenant in the deeds of the allotter and the general plan adopted which restrict the use of the property to residence purposes. If such restriction is not to be construed as preventing the use of the property for public purposes, then, of course, there is no violation on the part of the defendant, and it follows that no recovery can be had. If, on the other hand, it is to be construed as prohibiting the use of the property for any purpose other than that of residences, it would prevent a public use of the lots *and thereby defeat the RIGHT OF EMINENT DOMAIN*. No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to *prevent the State, or any body, politic or corporate, having the authority to exercise the right of eminent domain from devoting such property to a public use*. The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void.

* * * * *

“We are constrained to the conclusion that restrictive covenants in deeds or a general plan for the improvement of an allotment cannot be construed to *prevent the use of the lots for public purposes, and as against the State or any of its agencies which are vested with the right of eminent domain are illegal and void, confer no property right and cannot be the basis of a claim for damages.*”

And in the *Ward* case it was said:

“It appears from the amended petition that the defendant in error is a street railway company, organized under the laws of

the State of Ohio, owning and operating a system of street railways in the City of Cleveland and its adjacent and contiguous suburbs, and *vested with the right of eminent domain*. It is the owner by purchase of six lots in the allotment in question, and plaintiffs are asking that the company be enjoined from using the property for railway purposes. The covenants in the different deeds restricting the use of the lots in the allotment to residence purposes are *not binding upon a corporation possessing the right of eminent domain*. *Doan v. Cleveland Short Line Ry. Co.*, ante, 461. The demurrer to the petition was properly sustained, and the judgment of the Court of Appeals is therefore affirmed."

The principle of the cases just cited as proceeding upon the theory that *the act of devoting one's own property to a public use is an exercise of the power of eminent domain* is pointedly emphasized by another decision of the Ohio Supreme Court rendered the same day.

Wallace v. Clifton Land Co., 92 Ohio St., 349, 110 N. E. 940.

In that case lot owners who had purchased lots according to a general plan whereby uniform restrictions were imposed limiting the use of the land to residence purpose sought to enjoin a *real estate company* from devoting some of the lots which it had acquired under the same restrictions to road and street purposes. It was argued for the Land Company that its use of the lots for road and street purposes was a devotion to a public use and "that the public has the right to take private property for public use whenever it becomes necessary, and that no contract can be made that will prevent the state or any body po-

litic or corporate, *having the right of eminent domain*, from appropriated private property to a public use." The court stated that that was a "self-evident proposition" but "it is not the case presented for review." It then said: -

"These *private proprietors* have undertaken to create a public thoroughfare through this addition and over the lands subject to these restrictions. *Public ways cannot be established in this manner.* The need of such thoroughfares is *a question to be determined by the public authorities.* When these authorities have determined the necessities of such ways, private property can be taken for such use, regardless of restrictions or limitations placed upon the same by deed, contract or otherwise, and when established, these ways come under the control of the public authorities, whose duty it is to keep them in repair, free from nuisance and open for public travel. The question whether the owners of other lots in this addition have any property interest in these lots that would require them to be compensated before being taken for public use does not arise in this case.

"It is said in argument that these lots have already been deeded to the City of Lakewood for street purposes, but *no presumption obtains that the city will accept such grant*, for this carries with it burdens of construction, maintenance, care and control that the city authorities may not care to assume.

"The only question presented in this record is the question of the right of The Clifton Land Company to devote these lots, covered by these restrictions, to street purposes, and that question must be answered in the negative."

Thus in those three cases the highest court of the State has determined (1) that a devotion of

property to a public use cannot be accomplished by the act of the owner alone unless he have the power of eminent domain—some public authority must determine the need for the use and accept the devotion; (2) where an owner having the power of eminent domain devotes his property to a public use such devotion is an exercise of that power even though title to the land was acquired by purchase.

The same principle has been recognized in this court. See *California v. Pacific Ry. Co.*, 127 U. S. 1, 40.

It follows, therefore, that the appellees' devotion of the lands in question to a *public use** under color of authority of the franchise of the defendant Northern Ohio Power Company (which franchise was obtained *subsequently* to the grant of the plaintiff's franchise) is an exercise of the power of eminent domain and constitutes an *unlawful taking* of the plaintiff's property right in its perfected location, and hence should be enjoined.

Lewis, Eminent Domain, 3d ed., Sec. 901, 902;

Ohio cases cited at pp. 57, 58, our first brief;

Rochester Railroad case, cited at p. 61;

Denver & Rio Grande case, cited at pp. 61-66.

* By this we mean a use of a public nature, viz., power-development purposes. And to avoid confusion we repeat that the allegation of private use contained in paragraph Sixteenth of the bill relates to the Traction Company's own lack of the power of eminent domain, and must be read in connection with the other allegations that the franchise of the Northern Ohio Power Company, by the purchase of which the Traction Company sought to supply its own lack of eminent domain power, is null and void as to this plaintiff because subsequent in time and conflicting in location.

IX

Point I of the appellees' brief, pages 10 to 17, is devoted to the proposition that incorporation under the general statutes of Ohio does not constitute a contract or confer any exclusive franchise rights. That manifestly cannot be true unless the *Dartmouth College Case* is to be regarded as overruled. The decision in *Sears v. Akron* cannot be said to have accomplished that result. It is there expressly recognized that "incorporation alone" created some "contract right." See quotation at page 16 of appellees' brief. The question always is as to the *scope* of the contract. And though we have preferred to rest the case at bar principally upon the right acquired by the perfected location rather than upon that acquired by incorporation—*i. e.*, upon the *third* assignment of error rather than upon the *second* (Rec. p. 42)—it seems proper to point out what seem to us to be manifest errors in the argument set forth in Point I of the appellees' brief.

1. Much stress is laid upon the fact that any grant of corporate powers in Ohio is subject to amendment or repeal. That is immaterial here because the amendment or repeal must be by the General Assembly and it has not acted (See *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574 at p. 584). In this aspect the case at bar differs from *Sears v. Akron*.

2. The appellees, in speaking of the legislation under which the plaintiff was organized, say (Brief, p. 13):

"These laws authorize the formation of such corporations but make no direct or

definite provisions as to any specific locality in which they are to operate."

The truth is precisely the contrary. Section 8625 of the Ohio General Code expressly provides:

"If the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth (a) the kind of improvement intended to be constructed, (b) its termini and the counties in or through which it or its branches will pass."

And in *Callender v. Painsville, &c., R. R. Co.*, 11 Ohio St., 424, it was expressly ruled that that requirement is "*for the purpose of avoiding conflict in prior and subsequent grants of corporate powers.*" The language of the court in that case was as follows:

"Indeed it will be found, I apprehend, that the rule has been in our past legislation, to have the point of the termini somewhat indefinite in the charter, and that it has only become determinate by an actual location. Nor can I perceive that the language of the statute under consideration intended to change the rule in that regard. It was found convenient, and often necessary, under our special legislation, both for the limitation of the powers to be granted in the charter, AND FOR THE PURPOSE OF AVOIDING CONFLICT IN PRIOR AND SUBSEQUENT GRANTS OF CORPORATE POWERS FOR LIKE PURPOSES, to have reasonable certainty expressed in the charter. *For like reasons, and to secure the same objects, the certificate is required to express with like certainty, as was before expressed in the charter, as well the place of the termini and the counties through which a license to con-*

struct is asked, as the name of the company. And the certificate when thus made, acknowledged and certified, and recorded by the Secretary of the State, by force of the statute, becomes to the company, AND TO THIRD PERSONS, as authoritative a description and license to locate the road in a reasonable compliance with such description, as would the same language expressed in a special act or charter, under our former constitution."

3. The appellees further say with reference to corporations formed under the general laws of Ohio:

"There is no requirement that, having been formed, they shall perform any public service whatever. They are free to carry out the purposes named in their articles, or such part thereof as they may deem advantageous, as they see fit" (Brief, pp. 13, 14).

The truth, as declared by this court and the Supreme Court of Ohio, is just the reverse. In *New York Electric Lines Co. v. Empire City Subway*, 235 U. S. 179, 193, this court expressed the long-established rule as follows:

"Grants like the one under consideration are not *nude pacts* but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See *The Binghamton Bridge*, 3 Wall., 51, 74; *Pearsall v. Great Northern Railway*, 161 U. S. 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance."

In *Adena R. R. Co. v. Public Service Commission*, 92 Ohio St. 1, the Supreme Court of Ohio

affirmed an order of the Commission requiring a railroad company which had been *organized under the general laws of the State of Ohio* to provide certain passenger service and facilities, although the company had actually held itself out as a carrier of freight only. In so holding the court said:

“Having the undoubted power, under its charter, to perform the functions of a common carrier of passengers, it became amenable to the state’s control in relation to that specific duty. Its obligations are mutual and correlative. *Since the railroad company under its franchise could insist upon its right to carry passengers, the state could also insist upon the performance of that duty by the carrier with reasonable limits.*

“BY ITS INCORPORATION, UNDER THE GENERAL LAWS, THE CORPORATION ASSUMED THE PERFORMANCE OF DUTIES FOR THE BENEFIT OF THE PUBLIC GENERALLY AS A COMMON CARRIER. *Scofield v. The L. S. & M. S. Ry. Co.*, 43 Ohio St., 571; *State v. The Hazelton & Leetonia Ry. Co.*, 40 Ohio St., 504; 4 Elliot on Railroads (2 ed.), section 1392.

“That it has held itself out to the public, for a period of time, as a carrier of freight only, does not impinge upon *the right of the state to compel the exercise of its franchise*, if that right existed at the time of the grant and was not affected by subsequent legislation.”

In *Hocking Valley Ry. Co. v. Public Utilities Commission*, 92 Ohio St. 9, the Supreme Court of Ohio again affirmed an order requiring the Railway Company to establish and furnish certain passenger service. In so holding, the Court said:

“It is well established that *the benefits which result to the public constitute the*

consideration for the grant by the state of the franchises, rights and privileges held and exercised by a railroad company, and that their acceptance by the company imposes on it the obligation to operate the railroad which it was incorporated to construct, when constructed, and of doing so in the manner and for the purposes contemplated in its charter. One of the obligations thus imposed is to operate its trains that they will reasonably serve the needs of the public."

The State Court has also approved this statement of the law:

"It is, of course, well-settled law that a railroad may not render itself incapable of performing its duties to the public or absolve itself from those obligations without the consent of the state."

Kanawha & M. Ry. Co. v. Public Utilities Com., 96 Ohio St. 414, 429.

It is thus conclusively settled that by incorporation under the general laws of Ohio a corporation *assumes the obligation of performing the undertaking to which the incorporation relates.* The plaintiff was incorporated under the same general law as that under which railroads are incorporated, and the decisions cited are hence controlling.

4. The appellees say:

"The filing of articles of incorporation by one set of incorporators would not prevent the incorporation of another company with like purposes, nor would the designation of certain termini or the specification of a certain river in the articles of incorporation of one company preclude the organization thereafter of another company naming the same river for its field of operation" (Brief, p. 14).

Of course the filing of articles by one set of incorporators would not prevent the incorporation of another similar company *in a different location*. But to say that the designation of a location in the articles of one company does not preclude the organization of another company to operate *in that same place*, is to render meaningless the express provision §8625 of the Ohio Code requiring the articles to state the location, and would contradict the ruling made in *Callender v. Painesville &c. R. R. Co*, *supra*, in which it was said that *the very object of requiring a statement of the location in the articles is for the purpose of avoiding conflict in prior and subsequent grants*.

Indeed, the contention here advanced that a grant of the right to one place to one person does not preclude a second grant of the same right to another person is wholly inconsistent with the fundamental proposition upon which the *Dartmouth College Case* was decided, viz., "a grant, *in its own nature*, amounts to an extinguishment of the right of the grantor and implies a contract not to re-assert the right." The legislature having granted the right to one place to A cannot thereafter grant it to B. To accede to the contention of the appellees, therefore, would in very truth overrule the *Dartmouth College Case* in its entirety. *Fletcher v. Peck*, 6 Cranch, 87, and other landmarks of the law would also fall if the appellee's argument were acceded to.

The doctrine for which the appellees here contend would likewise lead to a manifest practical absurdity. If one set of incorporators may file articles for one location on one day and another set may file articles for the same location on another day, then the first set might refile addition-

al articles on the third day, and there would thus be created interminable confusion, with the result that neither corporation could in any way protect its rights or proceed with its operations.

The appellees themselves admit as much at page 18 of their brief.

5. The appellees say:

“The incorporators, to give a necessary definiteness to its purposes for indicating what shall be *intra vires* and *ultra vires*, recite in general language where the corporation is to conduct its operations, but these purposes may be enlarged or diminished or wholly unperformed” (Brief, p. 14).

As already pointed out, however, the statutory requirement that the articles of incorporation specify the location is *not* for the mere purpose of defining or limiting corporate powers. It is “for the purpose of avoiding conflict in prior and subsequent grants of corporate powers for like purposes” (*Callender v. Painesville &c. R. R. Co.*, *supra*). As also already pointed out, these purposes may *not* be left “wholly unperformed,” for there is an obligation resting upon the company to perform the public service to which the undertaking relates (*N. Y. Electric Lines v. Empire City Subway*, *supra*; *Adena R. R. Co. v. Public Service Commission*, *supra*; *Hocking Valley Ry. Co. v. Public Utilities Commission*, *supra*).

6. The appellees say:

“It seems to us impossible to read into the general language of this statute any intention of conferring any exclusive rights upon corporations which may be organized under it and there certainly cannot be read

into this general law the intention to confer any such exclusive rights of the extravagant character claimed by appellant" (Brief, p. 14).

If the legislature did not intend to confer upon corporations organized under these statutes *a right to construct and maintain a plant in the place designated in the articles*—a right that cannot exist unless there be included in it the right to exclude all other persons from the same place—what did it intend? Borrowing the language of this Court in *New York Electric Lines Co. v. Empire City Subway*, *supra*, the statutes under which the incorporation was effected were

"intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfill the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise, when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the (rights and powers conferred) should be subject to revocation at any time by the authorities—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made and there was nothing but a license which might be withdrawn at pleasure."

The sweeping contention in the present case is that the rights conferred by incorporation *do not even amount to a revocable license*. The appellees go far beyond that position and assert that, even prior to any repeal or revocation by the Legislature, the incorporation is so utterly

futile and abortive that it may be ignored by any and every third person. As put at page 14 of their brief, the incorporation, according to the view of the appellees, does not even "preclude the organization thereafter of another company naming the same river for its field of operations."

The practical result of such a doctrine is sufficient to demonstrate its unsoundness. The manifest intent of the legislature in enacting Section 10,128 of the General Code was to provide for the development of hydro-electric power from the waters of the rivers of the state through the instrumentality of incorporated companies, which, as shown by the eloquent language of MR. JUSTICE HOLMES in *Mt. Vernon Cotton Co. v. Alabama Power Co.* 240 U. S. 30, 32, is a great and beneficent public purpose. In order to obtain the rich benefits of such development the legislature conferred upon companies organized for that purpose the right to enter upon, survey, and appropriate the lands and waters necessary to construct and operate the plant (*Ohio Gen. Code*, Sec. 10,128). Could any effective development be secured if, after the incorporation of one company for the development of one river, another set of incorporators might immediately procure the organization of another company "naming the same river for its field of operation"? Manifestly not. Such a construction of the legislation would effectively prevent any development whatever and set the legislative purpose at naught. Public grants, it is true, are to be construed strictly in favor of the public, and ambiguities are to be resolved against the grantee, but "*this principle of construction does not de-*

ny to public offers A FAIR AND REASONABLE INTERPRETATION, or justify the withholding of that which it satisfactorily appears the grant was intended to convey" (*Russell v. Sebastian* 233 U. S. 195, 205). The only "fair and reasonable interpretation" of the legislation of Ohio upon this subject is that a company organized for the purpose named in the statute should be endowed with the rights and powers necessary to accomplish the purpose. And to that end it must be held that when one company has perfected a definite location it has a right to that place as against rival companies thereafter attempting to exercise a rival franchise in the same location. That is the claim we assert in this case. Certainly it cannot be deemed an extravagant one.

We do not claim that the plaintiff's charter protects it from mere competition. That was the ground of decision in *Charles River Bridge v. Warren Bridge* 11 Pet. 420, which forms the basis of the appellees' quotation from *Pearsall v. Great Northern Ry.* 161 U. S. 646, at page 15 of their brief. In the sense, therefore, that other hydro-electric corporations may be organized under the act under which the plaintiff's incorporation was effected, the plaintiff's franchise, we freely concede, is not exclusive. But in the sense that no other corporation may obtain the right to locate in the same place as the plaintiff, its franchise is obviously and necessarily exclusive.

In the *Charles River Bridge* case, Chief Justice TANEY was careful to point out (p. 549):

"The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles River bridge, nor make the way to it, or from it, less convenient. None of the facul-

ties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property, enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired."

It was *not even contended in that case that the Legislature might have authorized the construction of another bridge in the identical place occupied by the Charles River Bridge*. On the contrary, as pointed out by MR. JUSTICE STORY (pp. 603, 604):

"Every grant of a franchise is, SO FAR AS THAT GRANT EXTENDS, necessarily exclusive; and cannot be resumed or interfered with. All the learned judges in the state court (whose judgment was affirmed by this court) admitted that the franchise of Charles River bridge, whatever it be, could not be resumed or interfered with. The legislature could not recall its grant, or destroy it. It is a contract, whose obligation cannot be constitutionally impaired. In this respect, it does not differ from a grant of lands. In each case, the particular land, or the particular franchise, is withdrawn from the legislative operation. The identical land, or the identical franchise, cannot be regranted, or avoided by a new grant."

The distinction is well brought out in *Matter of Union Ferry Co.* 98 N. Y. 139, 153-154, in which it was contended that a grant was in conflict with the provision of the Constitution of the State that the Legislature should not pass any private or local bill granting any "exclusive" franchise, because the "designation of the particular piece of property to be condemned for the

purposes of the ferry renders the grant of the privilege or franchise exclusive, inasmuch as no one but the grantee of the power can take the same property." The Court held, however, that this was not "the nature of the exclusiveness contemplated by the Constitution." It said (p. 154):

"Where a toll-bridge is authorized to be erected at a particular locality, the right to that particular bridge is necessarily exclusive. *So of all lands acquired by a railroad company for depots, car yards, etc., their right to enjoy those lands is exclusive.* The right of the owner of upland to fill out into waters of the State in front of his land is exclusive in respect to the particular property involved, though a similar right may be conferred upon every person owning lands similarly situated."

The distinction was also made the basis of decision by the Supreme Court of Ohio in *Hamilton G. & C. Traction Co. v. Hamilton & L. Electric Transit Co.* 69 Ohio State 402. In that case the grantee of a franchise to construct, maintain and operate a street railroad upon certain streets in the City of Hamilton was successful in enjoining another company from operating a street railroad in the same streets (the tracks of the second company being laid in such manner as to straddle the tracks of the first company) under a second grant from the City. The Court expressly stated that by making the grant to the first company the City *did not exhaust its power or deprive itself of the right to make additional grants for like purposes "in and to the unoccupied portions of the street;"* but it held that so long as the first grant remained in

force the City *could not make a second grant to another company of the right to have and occupy "precisely the same ground or right of way first granted."* It said:

"To permit this would be to sanction and allow the impairment of the obligation of an existing contract by subsequent municipal legislation or grant. This may not rightfully be done."

The exclusiveness of the plaintiff's franchise (in the sense that it may not be impaired by a third person's use of *the same identical location*) is likewise established by the "conflicting location cases" cited on pages 12-25 of our first brief. The fundamental principle of those cases is that when the grant of a franchise to construct and operate a railroad or other utility between named termini has been *made specific by the adoption of a particular location*, the franchise necessarily becomes exclusive in the sense that, although other railroad companies may be subsequently incorporated to build other railroads, they cannot take or interfere with the location adopted by the first company. As said in one of the cases:

"That the plaintiff's franchise is exclusive so far as the right to construct a railroad on the line which has been adopted must be conceded, as another road cannot be constructed and operated on the same location; although the statute has not declared in express terms that the privilege is an exclusive one, it would lead to needless contention and disastrous disturbances to hold otherwise and give the statute a different construction."

Rochester H. & L. Co. v. N. Y. L. E. & W. R. R. Co. 44 Hun 206; 110 N. Y. 128.

X

At page 46 of the appellees' brief (next to last paragraph) there is the distinct, unqualified and deliberate admission that the parcels of land set forth in the bill are "plainly recoverable" by the plaintiff by means of a condemnation proceeding "if the facts set forth in its bill are true." And by way of emphasis there is added the statement that "upon the averments of the bill it is not possible to imagine why the plaintiff is dodging the direct and open road which all this time has lain before it"—*i. e.*, acquire the land by condemnation.

By their motion to dismiss the appellees admitted the truth of the facts set forth in the bill, and upon this appeal their truth must be conclusively presumed.

The plaintiff, then, according to the appellees' own statement, is clearly entitled to acquire the lands upon assessing and paying the owner's compensation. Yet, we find, from other allegations of the bill—all admitted to be true—that outside of this Court the appellees are asserting just the contrary (Bill, paragraph Seventeenth, Rec. pp. 9, 10) and are asserting their alleged devotion of the land to a public use as a bar to the plaintiff's right to acquire it.

Can there be any reason, then—inasmuch as the appellees here admit both the truth of the facts alleged and the legal conclusion that upon those facts the land is "plainly recoverable" by the plaintiff—why the appellees should not be enjoined from elsewhere denying the plaintiff's rights?

If the admission above mentioned had been made simply by way of argument, we would pay slight attention to it. But as it clearly deliberate and intentional, it is of the utmost importance and should be accepted and acted upon by this Court.

It leads directly to the conclusion that the plaintiff has a legal right to acquire the land in question but is prevented from so doing because of the appellees' use of the same and their wrongful assertion that their use is a bar to the plaintiff's acquisition of the lands. No remedy is available to the plaintiff save its appeal to this Court, and hence the decree should be reversed and the bill sustained.

Respectfully submitted,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Appellant.

March, 1920.



THE ARTHUR H. CRIST CO., COOPERSTOWN, N. Y.
New York Office, 220 Broadway

**PLEADINGS AND JUDGMENT IN
OHIO SOUTHERN R. R. CO. V. CIN-
CINNATI, H. & D. R. R. CO., DE-
CIDED BY JACKSON COUNTY
COMMON PLEAS, 1893.**

(a) Petition, Filed March 22, 1893.

State of Ohio, }
Jackson County, } ss.:

Court of Common Pleas.

THE OHIO SOUTHERN RAILROAD COM-
PANY,

Plaintiff,

v.

THE CINCINNATI, HAMILTON AND DAY-
TON RAILROAD COMPANY, M. D.
WOODFORD, J. E. GIMPERLING, C.
NEILSON, W. L. KING, SIMON GILLI-
VAN, JAMES BURNS, TIMOTHY LARRY,
and S. B. FLOETER,

Defendants.

Petition

The plaintiff says that it is a corporation duly incorporated under the laws of the State of Ohio, and is operating a railroad between the City of Springfield in Clarke County, Ohio, and the City of Wellston in Jackson County, Ohio; that the defendant, the Cincinnati, Hamilton and Dayton Railroad Company is a corporation incorporated under the laws of Ohio, and is lessee of and as such

lessee, controls and operates the Cincinnati, Dayton and Ironton Railroad, which runs from the City of Dayton, in the County of Montgomery, through the Counties of Greene, Fayette, Ross and Jackson, to a point in Lawrence County, Ohio; that said other defendants are officers and employees of the said the C. H. & D. R. R. Co.; said M. D. Woodford being the President thereof and its General Manager; said J. E. Gimperling being the superintendent of that portion of its line from Dayton to Wellston, Ohio; said C. Neilson being general superintendent thereof; said W. L. King being roadmaster thereof; said defendants Gillivan, Burns and Larry being section bosses thereof; and said Floeter being a trainmaster thereof.

Plaintiff is engaged in constructing its road having full and complete authority in the premises so to do, conferred upon it by law and by its stockholders, Directors and officers and is so engaged in constructing its road as aforesaid, by virtue of a resolution of its stockholders and certificate made in pursuance thereof, and having full power and performed all the things and acts required by law in the premises, authorizing the proper officers of plaintiff to extend its said railroad and is so extending the same from Jackson County, Ohio, up Horse Creed Branch to the city (formerly village) of Wellston, Ohio; thence to Lincoln Furnace, Jackson County, Ohio; thence to Cambell station on the (then) Ohio & West Virginia Railroad in Vinton County, Ohio; that said plaintiff is now engaged in constructing its said extension, and in order to do so, its line of road has been located in and over certain streets and alleys of the said City of Wellston, hereinafter mentioned; that on the day of December, 1892, and frequently since,

the plaintiff applied to the officers having authority and control over said streets and alleys, for right of way thereover on its located line hereafter designated and described, and being in the City of Wellston, Jackson County, Ohio, to wit:

Across Foster road at the Nail Mill, thence along the west side of Railroad Avenue along the west side of the C. H. & D. R. R. tracks, from their intersection with said Foster Road to 2nd Street, crossing all streets and alleys intersecting said Railroad Avenue or said C. H. & D. R. R. between said Foster Road and said 2nd Street; thence across said 2nd Street commencing at a point nearly opposite the alley between Lots 760 and 758 across the alley between Lots 757 and 758 and Lots 699 and 700; thence across 1st Street at or near the intersection of said 1st Street with Indiana Avenue; thence along Indiana Avenue on the west side of the C. H. & D. R. R. the entire length thereof commencing at the south line of said 1st Street, thence running northerly crossing all streets and alleys intersecting said avenue north of said 1st Street, thence in a northeasterly direction crossing the right of way heretofore granted to Harvey Wells, and assigns for street and belt railroad, thence still in a northeasterly direction crossing the street known as Wellston and Hamden Road, thence still in a northeasterly direction crossing Park Avenue of said city and also across the right of way granted to Harvey Wells and assigns for said street and belt railroad; and which right of way above set forth has been surveyed, located and staked as herein stated. No grant of a right of way or agreement for the use of said streets and alleys has been made and said city, through its

proper authorities, and this plaintiff, have been unable to and cannot agree upon the manner, terms and conditions by which said streets and alleys may be occupied as aforesaid.

On the 18th day of February, 1893, after its inability to agree with said city or its officers, plaintiff filed its petition in the Probate Court of Jackson County, Ohio, asking for the appropriation of so much of said streets and alleys for said Lot 3, as was necessary for plaintiff's use for railroad purposes—a strip 18 feet in width along the line and location above set forth. Plaintiff says that its line of railroad, to be extended as aforesaid, has long been located over said streets and alleys, and premises described and also shown by the plat hereto attached; that said location has been marked and designated by stakes placed 100 feet apart, and numbered from (0) to (140), along the route of plaintiff's railroad over the streets and alleys as designated herein; and the location and survey, and the designating marks of said location has been laid out on the east end of Lot 3 of Lasleys Lots in said City of Wellston; and the said plaintiff has endeavored, to agree with the owner of said strip for a right of way thereon, but has been unable to do so.

Plaintiff brought a suit in condemnation against the said City of Wellston and others to condemn a right of way on said located line, and the preliminary hearing was had and said plaintiff in said preliminary hearing by virtue of the findings of said Court proceeded in the condemnation of said city's rights in the streets and alleys thereof in which cause a jury was impanelled and the cause is now being heard in said Probate Court. The

defendant Railroad Company knowing of all the facts in this petition set forth, and having actual knowledge of plaintiff's location and survey, or, and for the sole purpose of hindering plaintiffs in its attempt to condemn, and with fraudulent intent, has obtained possession of said strip of said Lot 3, Lasley's lot with such knowledge, and with such fraudulent purpose, and are now engaged in constructing a switch thereon and upon and over plaintiff's location to the great and irreparable injury of this plaintiff, and which cannot be compensated in damages. And plaintiff has bought under the statute, adjoining premises to said Lot 3, and has agreed with the owners of various property along its right of way herein, upon the compensation terms, and manners of its occupation by plaintiffs. The defendant Railroad Company, its officers and servants herein named, with full knowledge of the location and designation of plaintiff's line of railroad as above stated, without any right so to do, and without appropriating or instituting any proceedings to appropriate the same to its, said defendant corporation's use, but for the purpose of interfering with the rights of plaintiff and the condemnation proceedings by it brought, and for the purpose of preventing plaintiff from obtaining the right to use and occupy the above premises for its purposes as aforesaid over its said location, and for the purpose of monopolizing the carrying trade and preventing full competition as common carriers in and through said part of said city, and for the purpose of acquiring for itself, without authority or proceedings, the premises easements in and over said streets and alleys upon which plaintiff's said line has been located, are about to and, threaten to, and unless

restrained by said Court, will take forcible possession of said premises and plaintiff's said located line, disturb the survey and designating marks thereof made by plaintiff in pursuance of the laws of Ohio, and will lay its tracks and construct its said defendant corporation railroad upon plaintiff's said located line of railroad, and will interfere with plaintiff's proceedings for the appropriation of the same in said Probate Court, and prevent plaintiff's use and occupancy of same. Said acts of the defendants, and threatened acts as above set forth, will be continuing injury to the plaintiff for which it has no adequate remedy at law, and will prevent the construction of its railroad on said premises, and interfere with plaintiff's pending suit aforesaid to appropriate the same to its said uses. Wherefore plaintiff prays that the defendants, together with all the officers of the said defendant corporation, and its servants and agents, acting under its authority or in its behalf may be temporarily restrained, and that on the final hearing hereof, they may be perpetually enjoined from disturbing the survey, location and the designating marks thereon and from laying its tracks and constructing a railroad over the premises herein named and designated, and from doing any of the acts herein complained of, and for such other and further relief as equity or the nature of the case may require.

H. T. MATHERS and
T. A. JONES,

Attorneys for the
Ohio Southern Railroad Co.,
Plaintiff.

The State of Ohio, }
Jackson County, } ss.:

T. A. Jones, being duly sworn, says that plaintiff in the above action is a corporation duly incorporated under the laws of the State of Ohio, and that he is its attorney duly authorized herein and that the facts stated in the foregoing petition of plaintiff are true.

T. A. JONES.

Sworn to before me, and subscribed }
in my presence this 22nd day of }
March, 1893. }

T. J. WILLIAMS, Clerk,
by E. P. Williams, Dep.

Certificate.

The State of Ohio, }
Jackson County, } ss.:

I, Glen Roush, Clerk of the Common Pleas Court, within and for said County, having the custody of the files, journals and records of said Court, do hereby certify that the foregoing is a true and correct copy of the original petition now on file in this office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Jackson, Ohio, this 27th day of September, A. D. 1915.

GLEN ROUSH,
Clerk of Courts.

**(b) Answer and Cross Petition, Filed
May 18, 1893.**

COURT OF COMMON PLEAS,
JACKSON COUNTY, OHIO.

THE OHIO SOUTHERN RAILROAD
COMPANY,

Plaintiff,

v.

THE CINCINNATI, HAMILTON AND
DAYTON RAILROAD COMPANY
et al.,

Defendants.

Answer and Cross
Petition of the
C. H. & D. R. R.
Co.

First Defense:

And now comes The Cincinnati, Hamilton and Dayton Railroad Company, one of said defendants, and for its separate answer to petition of plaintiff says: That it admits its corporate capacity and the corporate capacity of plaintiff, and that it is lessee and as such controls and operates the Cincinnati, Dayton and Ironton Railroad, which extends from the City of Dayton to the Village of Dean in Lawrence County, Ohio, and to and into the City of Wellston, in the County of Jackson and State of Ohio. It admits that M. D. Woodford is its President; that C. Neilson, is its General Superintendent, and that J. E. Gimperling is the Division Superintendent of the Cincinnati, Dayton and Ironton Railroad; that W. L. King is the Road Supervisor of the Cincinnati,

Dayton and Ironton Railroad; that S. B. Floeter is Train Master of said division, and that the other parties named are section men on said division. As to whether or not the plaintiff is authorized in the manner alleged in its petition, or in any other way, to construct a railroad between the points named in the petition and along the line stated, this defendant does not know and has not the means of knowing and therefore it denies the same. It admits that on the 18th day of February, 1893, that said plaintiff filed its petition in the Probate Court of Jackson County, Ohio, asking for the appropriation of certain parts of certain streets and alleys in the City of Wellston, for railroad purposes, but it denies each and every other allegation therein contained.

Second Defense and Cross Bill:

Defendant for a second and further defense, and by way of cross bill to petition of plaintiff, says: That the Cincinnati, Dayton and Ironton Railroad Company is a corporation duly incorporated under the laws of the State of Ohio, and that as such corporation it owns the railroad, right of way, etc., extending from the City of Dayton in Montgomery County, Ohio, to Dean in the County of Lawrence in said State, and also to and into the City of Wellston, in said County of Jackson. That that part of said railroad extending from the said City of Dayton, through the several counties, and to and into the said City of Wellston, in said County of Jackson, and State of Ohio, was originally located and constructed by the "Dayton and South-Eastern Railroad Company," and the tracks of its said railroad were completed to and into the City of Wellston in

June, 1880, and that the Cincinnati, Dayton and Ironton Railroad Company, is the successor, by legal proceeding and purchase of the said Dayton and South-Eastern Railroad. Plaintiff further says that it and its predecessors expended large sums of money and went to a great expense to secure the right of way, in and through the City of Wellston, and to locate, construct and maintain its main track and side tracks thereon and thereover, and that the same are necessary, in order to enable it to transact its business and to do business with the public, and that any interference therewith by having any railroad track, or other superstruction, constructed on or along the said right of way and tracks of the said railroad, through said City of Wellston, and within 18 feet west of the center of its main track, would, for all practical purposes defeat the object of this defendant and the said, The Cincinnati, Dayton and Ironton Railroad Company, in securing the said right of way and building and maintaining its tracks thereon, and that the public would be shut off from getting to its tracks or doing business with it on or along its said tracks, and side tracks in the said City of Wellston, between 11th Street, or what is known as Fosters Road, and from there north to the point where its said tracks leave Indiana Avenue, in said City of Wellston, going towards and to Wellston Mine, No. 3.

The defendant further says: That for a long time previous to the 22nd day of March, A. D. 1893, for the purpose of widening its right of way on the west side of the tracks of the Cincinnati, Dayton and Ironton Railroad, in and through the City of Wellston, between the said 11th Street or Foster Road, and said Second

Street, it had been negotiating for 25 feet of additional right of way, on the west side thereof, and that previous to said 22nd day of March, 1893, it had agreed with one T. M. Cheuvront for the purchase of 25 feet off of the east end of Lot No. 3, of what is known as Lasley's lots or Lasley's addition to the City of Wellston, and that on the 22nd day of March, 1893, the said Cheuvront, by a good and sufficient warrantee deed, conveyed the said 25 feet off of the east end of said Lot No. 3, to this defendant and this defendant paid him the full consideration therefor, and before that time and by and with the consent of Cheuvront, it had entered into the possession thereof, and has ever since and still does own, control and possess the same. This defendant further says, that the said plaintiff is threatening to locate and construct its railroad on and across this part of said Lot No. 3, so owned and possessed by this defendant, and if not restrained by this Court will unlawfully and forceably take possession of the same, without any right or authority so to do, and will then and thereby take possession of that part of the right of way and also of the property of this defendant in said City of Wellston, without any right whatsoever so to do, and thereby do great and irreparable injury to this defendant and to the property of its lessor, the Cincinnati, Dayton and Ironton Railroad Company.

This defendant therefore asks that the said plaintiff, The Ohio Southern Railroad Company, may be temporarily enjoined from encroaching upon or entering upon the right of way of the said Cincinnati, Dayton and Ironton Railroad Company, now leased and operated by this defendant, and also that it may be temporarily enjoined from

entering upon, disturbing, locating or attempting to locate, construct, or attempting to construct its railroad or tracks, or any part thereof, upon any of the property or rights of way of the said The Cincinnati, Dayton and Ironton Railroad Company, in or through the said City of Wellston, and also that it may be enjoined from entering upon, constructing or attempting to construct its railroad or tracks or any part thereof upon that part of said Lot No. 3, owned and occupied by this defendant and that upon the final hearing hereof the said injunction may be made perpetual and for such other and further relief as equity and justice may require.

R. D. MARSHALL,
M. T. VANPELT,
Attorneys for Defendant.

The State of Ohio, }
Montgomery County, } ss.:

J. E. Gimperling, being first duly sworn, deposes and says: That the defendant in the foregoing action is a corporation duly incorporated under the laws of Ohio, and that he is one of its agents, duly authorized, and that the facts stated and allegations made in the foregoing answer and cross bill of defendant, are true.

J. E. GIMPERLING.

Sworn to before me by J. E. Gimperling }
and by him subscribed in my presence }
this 27th day of April, A. D. 1893. }

A. McL. Marshall,
[SEAL] Notary Public,
Montgomery County, Ohio.

Certificate.

The State of Ohio, }
 Jackson County, } ss.:

I, Glen Roush, Clerk of the Common Pleas Court, within and for said County, having the custody of the files, journals and records of said Court, do hereby certify that the foregoing is a true and correct copy of the original answer and cross petition now on file in this office.

In witness whereof, I have hereunto set my hand and affixed the seal of said
 [SEAL.] Court, of Jackson, Ohio, this 27th day
 of September, A. D. 1915.

GLEN ROUSH,
 Clerk of Courts.

(c) Demurrer, Filed June 3, 1893.

State of Ohio, }
 Jackson County, } ss.:

COURT OF COMMON PLEAS,

THE OHIO SOUTHERN RAILROAD
 COMPANY,

Plaintiff,

v.

THE CINCINNATI, HAMILTON AND
 DAYTON RAILROAD COMPANY,
 Defendant.

Plaintiff demurs to the answer and cross peti-

tion, and to the first and second defenses therein contained and for demurrer says:

That said answer and cross petition does not, nor does either of the said defenses therein state facts sufficient to constitute a defense, or defenses to plaintiff's petition, or entitle defendant to the relief asked in the cross petition of defendant.

H. T. MATHERS and
T. A. JONES,
Attorneys for Plaintiff.

Certificate.

The State of Ohio, }
Jackson County, } ss.:

I, Glen Roush, Clerk of the Common Pleas Court, within and for said County, having the custody of the files, journals and records of said Court, do hereby certify that the foregoing is a true and correct copy of the original demurrer now on file in this office.

In witness whereof, I have hereunto set
my hand and affixed the seal of said
[SEAL.] Court, at Jackson, Ohio, this 27th day
of September, A. D. 1915.

GLEN ROUSH,
Clerk of Courts.

(d) Reply, Filed June 21, 1893.

State of Ohio, }
 Jackson County, } ss.:

COURT OF COMMON PLEAS,

THE OHIO SOUTHERN RAILROAD
 COMPANY,

Plaintiff,

v.

THE CINCINNATI, HAMILTON AND
 DAYTON RAILROAD COMPANY
et al.,

Defendants.

Now comes the plaintiff, by leave of this Court, and for reply to the answer and cross-petition of the defendant, the Cincinnati, Hamilton and Dayton Railroad Company, says:

That it admits that the said defendant has a track running through the City of Wellston, and that it owns a small amount of territory in said city which it is using for track purposes, but the said plaintiff says that its location as set forth in the petition does not encroach upon the territory or property rights of said corporation defendant; plaintiff denies that said corporation defendant has any right, title or interest in any part of the premises described in the petition other than said defendant claims to have a deed for certain premises known originally as Lot 3 of Lasley's outlots in said City of Wellston; plaintiff says that if said railroad corporation procured a deed for said

premises, that the same has not been placed on record, that said defendant railroad company procured the same in fraud of plaintiff's rights; that the line of location of plaintiff's railroad had before been surveyed, and located over the premises in controversy, and that the location had been marked and designated by stakes placed in the earth 100 feet apart, and consecutively numbered; that said location so surveyed and designated, passed over the premises named in the petition and over the said lot known as lot 3 of Lasley's outlots; that said plaintiff railroad had, throughout the City of Wellston, procured deeds for its said right of way and had expended large sums of money in procuring the same; that only three or four persons remained to be negotiated for from said 2nd street to said Foster's road in said city, and that plaintiff had procured and paid for the lands and lots contiguous to said Lot 3, and was proceeding to condemn said premises to its uses, when the said railroad defendant, well knowing that plaintiff had located its line as aforesaid, and that it had expended large sums of money in procuring its right of way, and for the sole purpose of fraudulently hindering the plaintiff from acquiring a right of way over its said located line, thrust or attempted to thrust a switch over the premises aforesaid; plaintiff says that it had brought proceedings in condemnation in the Probate of said County, in which it sought to condemn the rights of said City of Wellston in the premises described in the petition and in the premises herein described and called Lot 3, and which was dedicated to the public; that all of the preliminary questions had been heard by said Probate Court and decided in favor of plaintiff and a

jury empanelled in said Court, and on the day that said Court had appointed to try the questions of damages, the said railroad company, well knowing of the proceedings in condemnation, and having actual notice that the line of plaintiff had been located as herein stated, and that large purchases had been made for its right of way through said city, and also knowing that the plaintiff company was proceeding to condemn as aforesaid and that said proceedings were pending to condemn the premises in controversy, attempted to thrust a switch over the location of plaintiff which it was procuring as aforesaid. Said switch was attempted to be laid, for the sole purpose of rendering the right of way and location of plaintiff useless to plaintiff, and tended to make the proceedings in appropriation in said Probate Court of no force and effect; plaintiff says that it now has and holds possession of the premises by virtue of its appropriation to its uses in said Probate Court, and said switch was attempted to be laid laterally for some distance over the located line of plaintiff; and the same was not and from its nature could not be, of any practical value to the defendant corporation. Plaintiff says that if said switch was permitted to stand on the located line of plaintiff's right of way, that the rights procured and right of way bought by plaintiff and such as have been by it condemned for its uses, would be of no value to plaintiff and the plaintiff would not have any line of its own into the said City of Wellston; that the located line named in the petition is the only practical way into the central part of said city. Plaintiff denies that said defendant corporation has any franchises in said city other than its track rights

through a portion of its streets; denies that it has any property of rights in the premises named in, and denies that plaintiff will in any way, interfere with any franchise that said defendant has, or in any way enroach upon its property other than at a crossing point, where the plaintiff does not propose to cross without first acquiring the right to do so. And plaintiff denies each and every allegation contained in said answer and cross-petition inconsistent with the allegations herein contained.

Wherefore plaintiff insists upon the relief prayed for in its petition.

H. T. MATHERS and
T. A. JONES,
Attorneys for Plaintiff.

State of Ohio, }
Jackson County, } ss.:

T. A. Jones, being duly sworn, says that he is the attorney of the plaintiff, a corporation organized under the laws of the said State, and that he believes the facts contained in the foregoing reply, are true.

T. A. JONES.

Sworn to before me, and subscribed }
in my presence, this June 21, }
A. D. 1893. }

T. J. Williams,
Clerk of Courts.

Certificate.

The State of Ohio, }
 Jackson County, } ss.:

I, Glen Roush, Clerk of the Common Pleas Court, within and for said County, having the custody of the files, journals and records of said Court, do hereby certify that the foregoing is a true and correct copy of the original reply now on file in this office.

In witness whereof, I have hereunto set my hand and affixed the seal of said
 [SEAL.] Court, at Jackson, Ohio, this 27th day of September, A. D. 1915.

GLEN ROUSH,
 Clerk of Courts.

(e) Judgment.

COMMON PLEAS COURT,

JACKSON COUNTY, OHIO.

May Term, A. D. 1893.

THE OHIO SOUTHERN RAILROAD
 COMPANY,

Plaintiff,

v.

THE CINCINNATI, HAMILTON AND
 DAYTON R. R. Co.,
 Defendant.

} Equitable
 Relief.

And now comes the above named parties by

their attorneys, and thereupon this action came on for trial before the Court upon the issues joined between the parties.

On consideration whereof the Court finds the facts set forth in the petition of plaintiff to be true, in manner and form as the said plaintiff has in its said petition alleged against said defendant. It is therefore ordered and adjudged that the injunction heretofore granted in this action be and the same is hereby made perpetual, and that the said defendants are hereby perpetually enjoined from disturbing the survey location and designating marks thereon, and from laying its tracks and constructing a railroad upon the premises named in petition of plaintiff, and from doing any of the acts complained of in the said petition, and it is further considered that the said plaintiff recover against the said defendant its costs in and about its suit in this behalf expended, taxed to dollars.

And thereupon came the said The Cincinnati, Hamilton and Dayton Railroad Company and gave notice of its intention to appeal from so much of said judgment as affects it, and its rights and property, and on the motion of said The Cincinnati, Hamilton and Dayton Railroad Company, its said appeal is allowed on its giving bond in the sum of five hundred dollars (\$500.00) conditional to pay all moneys, costs and damages which may be required of or awarded against the said The Cincinnati, Hamilton and Dayton Railroad Company, by the said Court.

Certificate.

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The State of Ohio, }
Jackson County, }ss.:
Common Pleas Court,]

I, the undersigned, Clerk of the Court of Common Pleas, within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the Journal of the proceedings of said Court; that it has been compared by me with the original entry on said Journal, and that the same is a true and correct copy thereof.

In testimony whereof, I hereunto subscribe my name officially, and affix the seal of said County, at the Court House, in Jackson in said County, this 27th day of September, 1915.

GLEN ROUSH,
Clerk of said Court of Common Pleas.

Certificate.

The State of Ohio,)
Jackson County, }ss.:

I, Glen Roush, Clerk of the Common Pleas Court and the Court of Appeals (Formerly the Circuit), within and for said County, having the custody of the Files, Journals and Records of said Courts, do hereby certify that Cause No. 4396, The Ohio Southern Railroad Company, plaintiff, against The Cincinnati, Hamilton and Dayton Railroad Company *et al.*, defendants, was taken from the Common Pleas Court to the Circuit Court

Certificate.

of said County, on error, and was there dismissed for want of prosecution, as the records in this office will disclose.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Jackson, Ohio, this 27th day of September, A. D. 1915.

[SEAL.]

GLEN ROUSH,
Clerk of Courts.

In the Supreme Court of the United States

October Term, 1919.

NO. 102.

THE CUYAHOGA RIVER POWER COMPANY,

Appellant,

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY
and THE NORTHERN OHIO POWER COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

WRITERS FOR APPELLEES.

A. B. TOLLE,
V. H. HOGARTY,
JOHN E. MORLEY,

Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 102.

THE CUYAHOGA RIVER POWER COMPANY,

Appellant,

vs.

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY

and THE NORTHERN OHIO POWER COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR APPELLEES.

S. H. TOLLES,

T. H. HOGSETT,

JOHN E. MORLEY,

Counsel for Appellees.



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In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 102.

THE CUYAHOGA RIVER POWER COMPANY,

Appellant,

vs.

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY
and THE NORTHERN OHIO POWER COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This cause comes before this Court on an appeal by The Cuyahoga River Power Company, plaintiff below, from a decree entered in the District Court of the United States for the Northern District of Ohio, dismissing the plaintiff's bill of complaint. A motion to dismiss (record, page 36) was sustained by the District Court and final decree entered directing a dismissal of the bill for the reasons stated in the opinion of the court, which opinion sustained the motion upon the ground that the facts set up in the bill did not entitle the plaintiff to the equitable relief demanded, (Opinion of Judge Killits, record, page 26).

The rights and claims asserted by the appellant and involving most of the facts set forth in the bill of complaint, have been before this Court in several other cases heretofore decided, namely *The Cuyahoga River Power Company vs. City of Akron*, 240 U. S. 462; *The Cuyahoga River Power Company vs. The Northern Realty Company et al*, 244 U. S. 300, and *Sears, Trustee, vs. City of Akron*, 246 U. S. 242.

The allegations of the bill of complaint in this case may be briefly summarized as follows.

The plaintiff was incorporated as a hydro-electric power company under the general laws of the State of Ohio contained in Sections 10128 to 10134 of the Ohio General Code, for the purpose of building, maintaining and operating a system of dams, canals and locks in the Cuyahoga River and the erection of plants for the utilization of water power for the generation of electricity for light, heat, power and other purposes.

The original articles of incorporation, which were filed May 29th, 1908, specified that the improvements to be constructed by it should begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River, below the City of Akron, Summit County, Ohio, and extend along the Big Cuyahoga River through the County of Summit to the point where the Big Cuyahoga River crosses the line between Summit and Portage Counties, but by later amendment filed in 1912 the territory of operations was extended to include seven counties covering the watershed of a large part of northeastern Ohio.

The bill avers that by the fact of said incorporation "a contract was made between the State of Ohio and the plaintiff, whereby the state granted to the plaintiff a right of way along the Cuyahoga River between the points mentioned and a vested right and franchise to

construct, maintain and operate within the limits of said right of way a hydro-electric plant for the development of electric energy from the waters of the River."

On June 4th, 1908, plaintiff's Board of Directors adopted a plan for the development of hydro-electric power from the waters of the Cuyahoga River and located its proposed improvements upon several parcels of land which were declared to be necessary for the purpose of its organization, and which the bill avers were thereby appropriated for said purposes." (Par. Fifth of Bill, record, page 2).

A copy of the resolution is marked "Exhibit A" to the bill (record, page 16) and three certain parcels of land, one of forty acres designated the "*Everett parcel*" one of three-tenths of an acre designated the "*A. B. and C. parcel*" and a small parcel designated the "*Sackett parcel*" are (with other lands) described therein. The three parcels referred to are described as constituting a part of the bed and banks of the Cuyahoga River "at the lower end of the plaintiff's * * * right of way".

Title to the so-called Everett parcel of forty acres was then in Henry A. Everett (Mr. Everett being at that time an official of The Northern Ohio Traction and Light Company). The A. B. and C. parcel of three-tenths of an acre was then owned by The Northern Ohio Traction and Light Company, having been conveyed to it by The Akron, Bedford and Cleveland Railroad Company by deed dated December 29th, 1902 (The Akron, Bedford and Cleveland Railroad Company being one of the inter-urban railroad companies acquired by The Northern Ohio Traction and Light Company system). Subsequently The Northern Ohio Traction and Light Company acquired title to both the Everett parcel and the Sackett

parcel and at the time of the filing of the bill was the owner in fee of all three parcels, the bill reciting that Everett conveyed the Everett parcel to The Northern Realty Company on December 20th, 1910, the Realty Company conveying said parcel on January 31st, 1911, to The Northern Ohio Power Company, which on July 18th, 1911, purchased the Sackett parcel and on February 24th, 1914, conveyed both the Everett and Sackett parcels to The Northern Ohio Traction and Light Company (Pars. eighth and ninth of the bill, record, pages 4 and 5).

The defendant, The Northern Ohio Power Company, was incorporated January 31st, 1911, under the same Sections of the Ohio General Code governing the incorporation of the plaintiff, its articles of incorporation also specifying the Cuyahoga River as the stream upon which its proposed improvements were to be constructed. The property rights and franchises of The Northern Ohio Power Company were, in February, 1914, conveyed and transferred to the defendant, The Northern Ohio Traction and Light Company pursuant to the authority of an order of the Public Utilities Commission of Ohio, said order and the petition upon which the same was granted being annexed to the bill as Exhibits "B" and "C" (record, pages 23 and 28), by which petition and order it appears that the moneys theretofore expended by The Northern Ohio Power Company for the erection of power plants upon the property were advanced by The Northern Ohio Traction and Light Company.

The bill goes on to aver that upon the adoption of the resolution by its Board of Directors above referred to, the plaintiff on June 5th, 1908, commenced a suit to

condemn and appropriate the parcels of land described in said resolution and procured service of process upon The Akron, Bedford and Cleveland Railroad Company, Fannie V. Sackett and Henry A. Everett, and upon The Northern Ohio Traction and Light Company as a claimant of some interest in the property sought to be condemned, the further averment being that "said appropriation suit was continuously pending until a date subsequent to July 18, 1911; but * * * was not pressed for trial * * * until January, 1911 * * *." It should be observed therefore that there is no showing on the face of the bill that this appropriation suit of June, 1908, was pending at the time of the filing of the bill herein or that it had been determined in plaintiff's favor. The fair inference from the pleading is that this appropriation suit has either been determined adversely to the plaintiff or else allowed to lapse.

As a matter of fact it was dismissed by the plaintiff in 1911 as appears from the record of the *Northern Realty Company case*, filed in this Court, hereinbefore referred to. (Record pages 3, 4 and 9 in case No. 342, Oct. term, 1916.)

It is further averred that on January 20th, 1911, the plaintiff instituted in the Summit County Probate Court another suit to condemn and appropriate the *Everett and A. B. and C. parcels*, in which suit the sole defendant was said Realty Company. Inasmuch as the bill shows that the Realty Company did not then or ever own the A. B. and C. parcel, it is clear that this appropriation suit would affect only the Everett parcel. As to this suit the averment of the bill is that it has been diligently prosecuted and is now pending undetermined in the Supreme Court of the United States, having been carried by the plaintiff to the United States Supreme Court by

writ of error from the Court of Appeals of the State of Ohio. Although the bill does not so aver, we believe that this Court will take notice of the fact that this appropriation suit against the Northern Ohio Realty Company and to which The Northern Ohio Traction and Light Company was made a party defendant, has been determined adversely to the plaintiff by this Court, *Cuyahoga River Power Co. vs. Northern Realty Co.*, 244 U. S. 300, so that at this time the only appropriation suit which the bill avers as pending has now been definitely concluded as denying plaintiff's right to appropriate the land in question from the defendant.

The bill further avers that between January 31st, 1911, and February 24th, 1914, (on which date The Northern Ohio Power Company transferred the Sackett and Everett parcels to The Northern Ohio Traction and Light Company) there were erected upon the Everett and Sackett and A. B. and C. parcels certain power plants of large capacity, involving the use of the waters of the Cuyahoga River, these power plants being now used by The Northern Ohio Traction and Light Company for the generation of electric current for its purposes; that the Traction Company has spent large sums of money for the construction of these plants from the proceeds of securities issued by it under authority of the Public Utilities Commission of Ohio and is about to construct extensive additions thereto and expend further large sums from the proceeds of further securities authorized by said Commission and which are to be secured by a lien upon the properties in question (record, page 10).

It is averred that all the acts of the defendants with respect to the acquisition and improvement of said parcels since June 5th, 1908, have been performed with

knowledge of plaintiff's rights and franchises and with knowledge that such acts would interfere with the exercise of its rights; that the defendant's use of the three parcels in question "makes it impossible for the plaintiff to occupy its right of way or exercise its franchise or carry on its corporate purpose or attain its corporate objects" and that, "if the defendants continue their use of said parcels, the State's grant and command to the plaintiff to develop hydro-electric power from the waters of said river will be nullified" (Bill, Par. eighteenth, record, pages 10 and 11).

It appears from the bill that the defendant, The Northern Ohio Traction and Light Company, is an inter-urban and street railway company, incorporated November 24th, 1902, and is engaged in the business of operating lines of electric railway through and between the cities of Cleveland and Akron and other towns and villages in the vicinity thereof, the purposes named in its articles of incorporation being set forth in paragraph fourteenth of the bill (record, pages 7 and 8).

The bill states however that the defendant Traction Company has not and never has had

"any corporate power or authority or any right or franchise to exercise the power of eminent domain, for the purpose of acquiring power houses or the lands necessary therefore, (except, etc.) * * *; and that said Traction Company's use of said Everett, Sackett and A. B. and C. parcels, and each of them, is and always has been a private use, and not a public use." (Par. sixteenth, record, page 9).

It is averred, however, that the defendant Traction Company claims and asserts that its acts with reference to the acquisition and use of the three parcels of land in controversy are being had in the exercise of rights conferred upon it by the State of Ohio and that it further

claims that its use of said parcels is a public use and that for that reason said parcels cannot be taken or appropriated by the Plaintiff (Bill, par. seventeenth, record, pages 9 and 10).

In an attempt to found its jurisdictional claim plaintiff further, in Par. Nineteenth of its bill (record, page 11) avers that its said right of way and franchises are contracts and property rights; that defendant's use of the three parcels of land in controversy ousts the plaintiff from its "right of way" and deprives it of its said "right of way" and franchises; and it is claimed that such use by the defendants is an appropriation to defendant's use of such "right of way" within the meaning of Section 5 of Article 12 of the Constitution of the State of Ohio, and

"amounts to and is a taking and deprivation of its property for a *private use* and without compensation and without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and also an impairment of the contract of the plaintiff with the State of Ohio within the meaning of Section 10 of Article 1 of said Constitution of the United States."

The bill closes with a conclusion of the pleader that by reason of the defendants' acts as averred, the plaintiff's contracts with the State of Ohio are being impaired by the laws of said state, and the acts and doings of the defendants under color of authority of such laws and under and as an assertion of power from said state are all in contravention and violation of Section 10 of Article 1 of the Fourteenth Amendment of the Constitution of the United States.

The bill then prays in substance that plaintiff's alleged contract and property rights be established and

adjudged by the court and that the defendants be enjoined from in anyway appropriating, trespassing upon, interfering with or impairing or injuring any such alleged rights of the plaintiff, and particularly be enjoined from using the three parcels of land in question or further improving said parcels or placing any lien or encumbrance thereon under the authority of the above mentioned order of the Public Utilities Commission of Ohio, and from asserting that their use of the parcels referred to is a public use, or in any other manner clouding the title of the plaintiff to its alleged right of way and franchises, or interfering with the exercise of its corporate rights, including the right to acquire by the exercise of the power of eminent domain an absolute title to and ownership of said parcels. Plaintiff further asks that the defendants be required to either remove the structures upon the premises described or to grant and convey such structures to plaintiff for use by it in connection with its rights and franchises, and for a receiver to take possession of such structures and for an accounting and damages. (record, pages 13 and 14).

It will be seen, therefore, that the substance of the claim made in the bill is:

That the plaintiff was incorporated under the general laws of the State of Ohio in 1908, to construct and develop a hydro-electric property within certain geographical limits, and, in fulfillment of its objects, was authorized by the state to exercise the power of eminent domain;

That by purely intra-corporate acts it determined to acquire by condemnation or otherwise certain property which it deemed necessary to carry out its plan of development, including the three parcels of land in question;

That condemnation suits instituted by it in the proper state court for the appropriation of these parcels have either been allowed to lapse or have been determined adversely to it and that it has never been finally decreed to have the right to appropriate these parcels or any of them and has never paid to the defendants or any prior owner of the parcels compensation therefor;

That the defendant Traction Company, operating a system of street and interurban railroads in the territory concerned, but, as averred by the bill, without power of eminent domain to acquire lands for power house purposes, has acquired and is now the legal owner of said parcels, and, at the cost of several million dollars, has erected large power plants thereon for the supply of electric current for its lines;

That this use, although asserted by the defendants to be a public use, is by the allegations of the bill averred to be strictly private use of the property.

On these facts the plaintiff asks the court to enjoin the defendants from in any manner using or improving the property and asks that the power plants erected thereon be conveyed to it and a receiver appointed to take possession thereof pending such conveyance.

ARGUMENT.

I.

Incorporation under the general statutes of Ohio covering the incorporation of hydro-electric companies did not constitute a contract with the State or confer any exclusive franchise rights.

The claim of the bill is that

“by said incorporation a contract was duly made and entered into between the State of Ohio and the

plaintiff wherein and whereby said state duly granted to the plaintiff a right of way over and across said Cuyahoga River between the above mentioned termini and a vested right and franchise to construct, maintain and operate within the limits of said right of way a hydro-electric plant for the development of electric current and energy from the waters of said River" (Bill, par. third, record, page 2).

We submit that no such grant or contract arises from the fact of incorporation. In the first place it is clear that any grant of corporate powers in Ohio is subject to amendment or repeal and that no irrevocable privileges or immunities can be granted. The Ohio Constitution provides:

"Article I, Section 2. No special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."

"Article XIII. Section 1. The General Assembly shall pass no special act conferring corporate powers."

"Article XIII. Section 2. Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed * * *"

The Supreme Court of Ohio has said, *State ex rel vs. City of Hamilton*, 47 O. S. 51,, at page 74, referring to the above constitutional provisions:

"The constitutional provisions entered into the general law, and operated as to all corporations organized under it, in the same manner as a reservation to the legislature embodied in a special charter. Such reservation in a special charter or under a general law, negatives an intention on the part of the legislature to confer irrevocable rights upon the corporators."

To the same effect is the decision of this Court in *Hamilton Gas Light Co. vs. Hamilton City*, 146 U. S. 258, the court in the opinion by Mr. Justice Harlan (page 270) saying:

“This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligations of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation.”

This principle has been repeatedly affirmed by this Court. Thus in *Calder vs. Michigan*, 218 U. S. 591, in which the Grand Rapids Hydraulic Company claimed that its constitutional rights were impaired by repeal of its charter, the court after pointing out the power of amendment of repeal reserved in the charter held (syllabus) that:

“A corporation contracts subject, and not paramount to, the reservations in its charter and cannot by making contracts or incurring obligations, remove or affect such reservations.”

And in *Ramapo Water Co. vs. City of New York*, 236 U. S. 579, where the Water Company sought to restrain the

City from proceeding with the construction of a water system, it was held (syllabus) that:

“Where the constitution of the state reserves the right to do so, the charter of a corporation may be repealed without impairing the obligation of a contract.”

And at page 583 the court say:

“The charter of the company could of course be repealed without impairing the obligation of a contract as the right was reserved, as usual, in the constitution of the state.”

It is further true that any rights which may have been acquired under the Power Company's charter were taken, not only subject to all subsequent legislation, but especially to all general legislation existing at the date of incorporation.

Lehigh Water Co. vs. Easton, 121 U. S. 388.

And this principle has been specifically applied by this Court to the taking of water for a municipal water supply as affecting water power companies.

St. Anthony Falls Water Power Co. vs. Water Comm. St. Paul, 168 U. S. 349.

There is, however, nothing in the general legislation under which the Power Company was incorporated that purports to confer any exclusive rights or any vested right or franchise to special or exclusive privileges in any river, stream or other waters of the state to companies organized thereunder. These laws authorize the formation of such corporations but make no direct or definite provisions as to any specific locality in which they are to operate. There is no requirement that, having been formed, they shall perform any public service whatever. They are free to carry out the purposes named in their articles, or such part thereof as they may

deem advantageous, as they see fit. The filing of articles of incorporation by one set of incorporators would not prevent the incorporation of another company with like purposes, nor would the designation of certain termini or the specification of a certain river in the articles of incorporation of one company preclude the organization thereafter of another company naming the same river for its field of operations.

The incorporators, to give a necessary definiteness to its purposes for indicating what shall be *intra vires* and *ultra vires*, recite in general language where the corporation is to conduct its operations, but these purposes may be enlarged or diminished or wholly unperformed. In this particular case the original articles of incorporation of the Power Company state in substance that it was formed for the purpose of building and operating dams in the Cuyahoga River, erecting a power plant and constructing line or lines of poles for transmitting electricity and specified that its improvements were to be between certain points on the Cuyahoga River. This might involve a very extensive water power development or a very small one. The company might proceed to develop and use all of the water power of the river between those points, or but a very small part thereof as it should see fit, and it might erect one dam or several.

It seems to us impossible to read into the general language of this statute any intention of conferring any exclusive rights upon corporations which may be organized under it and there certainly cannot be read into this general law the intention to confer any such exclusive rights of the extravagant character claimed by appellant.

“An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contains

words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed."

Pearsall vs. Great Northern Ry., 161 U. S. 646,
at page 664.

See also *Bank of Commerce vs. Tennessee*, 163 U. S. 416, 424.

It is shown by the bill that The Northern Ohio Traction and Light Company filed its articles of incorporation in 1902 as a street and interurban railway company and that the defendant, The Northern Ohio Power Company filed articles as a hydro-electric company in 1911. It certainly cannot be contended that the incorporation and empowering of the Traction Company in 1902 impaired any contract rights which plaintiff claims to have acquired under its incorporation in 1908. The only assertion of state impairment of contract obligation possible under the averments of the bill therefore is that by the incorporation of The Northern Ohio Power Company in 1911 and the subsequent conveyance of its property and franchises to the Traction Company under authority given by the State Public Utilities Commission, plaintiff's alleged contract of 1908 with the state is impaired. The charter, however, of The Northern Ohio Power Company in 1911 and the subsequent transfer of its property to the Traction Company did not for the reasons above stated impair any contract rights of the plaintiff. Plaintiff's incorporation gave it no exclusive franchise rights to the development of water power in the territory set forth in its articles and did not in any way preclude the incorporation of other companies who might desire to enter said territory.

Further argument on this proposition is, however, unnecessary for the claims of the defendant in this respect have been definitely disposed of by the decision of this Court in *Sears, Trustee vs. City of Akron*, 246 U. S. 242, where the same claim of contract right and of alleged impairment thereof by the state was asserted. The court on page 248 of the opinion by Mr. Justice Brandeis says:

“First: As to the alleged impairment of contract: Plaintiff contends that the incorporation of the company in 1908 under the general laws constituted a contract by which the state granted it the right to construct and operate a power system in the places designated in the certificate and the right to take property for that purpose and to have the water flow past that property uninterrupted and undiminished; and that the ordinance of 1913 is a law which impairs that contract in violation of Article I, Section 10, of the Federal Constitution. It is clear that the contract right created by incorporation alone was not illegally impaired by the ordinance, because there was no contract by the state with reference to the water rights. Incorporation did not imply an agreement that the quantity of water available for development by the company would not be diminished. *St. Anthony Falls Water Power Co. vs. St. Paul Water Commissioners*, 168 U. S. 349, 371. The so-called charter simply conferred upon the company the power to take lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant. If by purchase or by right of eminent domain under the charter powers the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may otherwise acquire from the owners specific rights in the use and flow of the water. But these would be property acquired *under* the charter, not contract rights expressed or implied in the grant of the charter.

Furthermore, the contract inhering in the charter (as distinguished from property acquired under the charter) was subject to the state's reserved power to amend or repeal, as provided in Art. XIII, Section 2, of the Ohio constitution. *Ramapo Water Co. vs. City of New York*, 236 U. S. 579, 583. The act of 1911, under which the city proceeded, may be treated as an amendment of the company's charter making its rights subject to those of the city, if that is necessary to justify the proceeding of the city, which the act authorized. See *State vs. City of Hamilton*, 47 Ohio St. 52, 74; *Hamilton Gas Light Co. vs. Hamilton City*, 146 U. S. 258; *Berea College vs. Kentucky*, 211 U. S. 45, 57."

This decision would seem to finally dispose of any such claim of contract impairment.

II.

The adoption by the plaintiff by private corporate act of plans for the development of its water power project, locating by resolution its proposed improvements upon designated parcels of land, gave plaintiff no property interest in the lands in question, or right to prevent any lawful use thereof by the owner.

The plaintiff claims that by the adoption of the plan for its proposed water power project and the resolution of its Board of Directors locating its proposed improvements upon specifically described parcels of land, it acquired a vested property right in the location adopted and an actual interest in the lands in question, such that a court of equity should prevent their use and enjoyment by the defendant Traction Company, which is the owner of the legal title and in possession of the property. In

support of this claim it cites a line of authorities in which Railroad Companies or other similar public utility companies having the right of eminent domain have been held to have a preferential right to a definitely located route as against subsequent location on the same property by rival companies. This phase of the matter it is said was not decided by this Court in the *Sears case*, the following language from the opinion of the court on page 250 being cited:

“* * * Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider.” (*Sears, Trustee, vs. City of Akron, supra*”).

Undoubtedly, as a mere matter of expediency between railroad corporations or other similar *quasi* public corporations having the right of eminent domain, the corporation which first commences the exercise of the right to appropriation by proper proceedings should be held, unless precluded by dilatory conduct or other sufficient reason, entitled to retain the property appropriated against a later locator or appropriation to public use by another company. Otherwise there might be no end to conflicting locations or appropriations by such corporations.

In some states the adoption of a specified route by corporate resolution, followed, in some jurisdictions where the statutes require it, by the filing of a map in a public office, has been held to be in itself an act of appropriation giving rise to such preferential right. This, however, would not seem to be the law in Ohio and in this connection we quote from the opinion of the District

Court for the Northern District of Ohio in the case of *Sears, Trustee, vs. City of Akron*, rendered by Mr. Justice Clarke, then District Judge, as follows (the opinion may be found in the printed record of *Sears, Trustee, vs. City of Akron*, No. 105, Oct. term, 1917, on file in this Court):

“In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken, or payment made does not give to the plaintiff any title or right whatever legal or equitable in the lands embraced within such paper scheme. This is distinctly the settled law of Ohio, and the best expression of it is, I think, to be found in the case of *Columbus, etc., Co. vs. T. & O. C. Ry. Co.*, 32 W. L. B., 186. This is a Common Pleas Court decision, but it is well worked out and the absence of decision by higher courts on a question which must have frequently arisen is of itself strongly confirmatory of its authority as an expression of the accepted law of the state. The court says:

‘But the grant, by articles of incorporation to a railroad company of a right to construct a road is afloat; it attaches to no specific lands until the line of the road is sufficiently fixed by purchase of the land, or by condemnation proceedings and acceptance of the land condemned. Even after the land is condemned the Railroad Company may elect not to pay the price and accept the land. The fact that a Railroad Company has surveyed and staked a line upon certain grounds does not conclude it, why then should it conclude anybody else? The company may survey and stake more than one line and by comparing the cost and advantages of each of them, determine upon which it will build, but the line is not definitely established until the land is condemned, paid for or accepted, or purchased by agreement.’

So in *State of Ohio, ex rel vs. Cincinnati*, 17 O. S., 103, the court states what is well known to this Court to be the opinion of the profession of the state that 'no appropriation of the lands of the relators could be completed, no title from them could be acquired and no incumbrance could be imposed on their estate by the railroad company until the amount of compensation fixed by the findings of the jury was paid in money or secured to be paid, by a deposit of money.'

"The plaintiff has no power of eminent domain greater or other than a railroad company has. In the State of Ohio there is not now and never has been any statute requiring a corporation desiring to exercise the right of eminent domain to file in any public office a map or survey of the route or plan of the improvement adopted by the Company, so that the rule that land owners or other corporations are in any wise estopped or their property encumbered by the mere private resolution of a company possessing the power of eminent domain has never prevailed in this state as it has in some other states."

It is the organic law of Ohio that "private property shall ever be held inviolate, but subservient to the public welfare" and that "where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury. * *." (Ohio Constitution, Article I, Section 19.)

The Ohio Supreme Court has fully recognized the constitutional requirement in the case of *Ohio ex rel vs. Cincinnati*, 17 O. S., 103, cited in the opinion of Judge Clarke above quoted, and in the case of *Wagner vs. Railway*, 38 O. S., 32. In the latter case the court held that not until there is a judgment confirming the verdict of the jury in appropriation proceedings is there an appro-

appropriation and the corporation entitled to possession. At page 36 the court say:

*"No right of possession is divested until the appropriation is completed. The owner's right to dominion over his land is as inviolable as his ownership or title. * * . To deprive the owner of his right of possession, until the appropriation is made, would be as obnoxious to the constitution as to take the title. * * . Again, the rights of the parties are mutual. Whenever the corporation is entitled to take the land, its former owner is equally entitled to the money. The right to the money accrues eo instanti with the right to take the land, otherwise compensation would not first be made."*

The peculiar necessity of this rule under the Ohio Statutes is apparent upon an examination of the appropriation statute, which permits abandonment of proceedings by the petitioner in the following language:

"The corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses and attorney fees, as found by the court." (Ohio Gen. Code, Section 11060.)

Defendant Traction Company is shown to be the private owner of certain real property. Plaintiff is authorized by the legislature of Ohio to appropriate property for its corporate uses in the manner provided for corporations generally (Ohio Gen. Code, Section 10129). It claims to have instituted certain proceedings to appropriate three parcels of land now owned by defendant Traction Company. It does not show a determination of those proceedings in its favor, while as a matter of fact and from the records of this Court we know that of the two proceedings referred to, one has been dismissed by it and the other has been finally determined adversely to it. It does not show that it has paid or se-

cured by deposit of money the payment of compensation to any owner of any portion of the three parcels referred to. It is entirely manifest therefore that plaintiff is not entitled to possession of any portion of such property and therefore that it is not entitled to the relief which it asks.

In this view of the case the broad conclusions and claims of the bill of complaint shrink to their proper proportions.

The doctrine with respect to a preferential right in the first locator as between two rival companies is limited to cases arising between rival companies, each having the right of eminent domain and each seeking to appropriate the property in question to public use. The doctrine, we submit, has no application at all to such location by railroad or other public utility as affecting the use of his land by a private property owner or anyone holding land in a purely private capacity.

The averments of the bill are that the defendant Traction Company has not and never has had the right of eminent domain for the purpose of acquiring power houses or the lands necessary therefor and that the Traction Company's use of the parcels of land in question is and always has been a private use and not a public use (bill par. sixteenth, record page 9). On the plain averments of the bill therefore the Traction Company is in the position of a private land owner making private, and not public, use of his own property. There is no place, therefore, for the doctrine of preferential right as between rival companies, each having the right of eminent domain and each desiring to appropriate the property in controversy between them to a public use.

It is true that the bill avers that the Traction Company is asserting a claim that the property has been de-

voted by it to a public use and, therefore, cannot be taken from it by appropriation, but this averment can amount to nothing in the face of the plain allegations of the bill that the Traction Company has no right of eminent domain as respects the land in question and that its use thereof is entirely private.

It is apparently conceded by counsel for appellant in their brief that an owner of land may make such use of his land as he sees fit until actual appropriation thereof by proper proceedings and assessment of compensation is had, and that such use cannot be interfered with prior to such appropriation merely because the land is included in some location adopted by some Company having the right to appropriate it. If this is true, can the fact that such private owner has made the assertion that his use is public give the locating company any higher or additional right in a suit brought to enjoin such use? If this were an action against John Smith, an individual land owner, for the purpose of enjoining such owner's use of his property because included in plaintiff's attempted location, it certainly would avail nothing to aver in the bill that the defendant claimed his use of the land to be a public use and that plaintiff had no right to take it from him, and such averment can certainly have no greater bearing here simply because the defendant appears to be an interurban railroad company. Plaintiff must certainly stand upon the allegations of its bill, that the use of the land is entirely private and that the defendant has no rights in the property other than those of a private owner.

It is claimed by appellant in its brief that this assertion of the Traction Company constitutes a cloud upon plaintiff's title and, therefore, forms a basis for equitable relief, and we will now consider this phase of the matter.

III.

The plaintiff is not entitled to the equitable relief sought for on the theory of quieting title.

The District Court below, as stated in appellant's brief, declared that it did not appear from the bill that the plaintiff's operations were at the present time interfered with in any practical way by defendant's use of its property, and that pending the time when the plaintiff should complete a condemnation proceeding it saw no reason why the Traction Company should not be permitted to use the land for its purposes and the court distinguished the *Binghampton Bridge Case*, 3 Wall 51, and *Hamilton, G. & C. Traction Co. vs. Hamilton & L. E. Transit Co.*, 69 O. S., 402, relied upon by the plaintiff, upon the ground that in those cases the question was "one of actual and present interference with the rights of the corporation in the operative enjoyment of the privileges of its charter." This view of the court is criticized by appellant upon the ground that "it loses sight of the practical difficulties thrown in plaintiff's way by the very fact that defendants are using the land for power development purposes and asserting that such use is a bar to plaintiff's right to acquire the land for itself." This it is said is an interference with and an invasion of plaintiff's rights because, counsel say, "how can the plaintiff as a matter of business judgment and common sense go ahead with the purchase of other lands, the construction of dams, machinery or appliances, when it is uncertain as to whether it will be able to obtain lands herein involved which are an essential part of the enterprise?" (Appellants' Brief, p. 53.) This assertion, therefore, of the Traction Company it is claimed constitutes a cloud upon plaintiff's so-called property rights,

is an actual invasion of such rights and forms a basis for the equitable relief asked.

Counsel on page 56 of their brief say:

“The defendants may hold the land until condemned and may use it for any private use they please, but when they attempt to use it for a public use and assert and claim that their use is a public use which defeats the right of the first locator to appropriate it, they invade, take and destroy the franchise of the first locator, the plaintiff.”

It being conceded in the bill that defendant's use of the land is a private use, it necessarily follows that, conforming to the above reasoning, the defendant's assertion constitutes the sole invasion of plaintiff's franchise. It is not the Traction Company's use of the land for power purposes that is complained of. This, it is alleged, is a private use. If a private owner or a mill company owned these lands and erected a power plant thereon the plaintiff would have no right to interfere with such use, but, if such owner asserts that such use is public and denies the plaintiff's right to take the lands away from him by condemnation, such assertion immediately gives rise to a right in the plaintiff to enjoin the owner's use and take away the lands from him in advance of any condemnation thereof. The mere statement of such a proposition would seem to show its absurdity.

It should be borne in mind that the purpose of the bill is not merely to adjudicate whether or not the defendant's assertion is right or to enjoin the defendant from making such assertion (which we submit would be merely the trial of a moot question), but the bill seeks to enjoin the defendant's use of its lands, which use is averred in the bill to be a strictly private use, and to

actually take the property away from the defendant by requiring its conveyance to the plaintiff by mandatory injunction and the appointment of a receiver to forthwith take possession thereof.

We submit that a suit to quiet title can be brought only by one in possession and being either the owner of lands or having some actual interest therein, such as the leasehold title of a lessor giving the right of possession. This at least is the rule in the Federal Courts, *Whitehead vs. Shattuck*, 138 U. S., 146; *Boston etc. Mining Co. vs. Montana Ore Co.*, 188 U. S., 632. No case is cited by appellant where a strictly lawful use of one's land by the owner thereof can be enjoined by one having no legal or equitable title to the lands or in any way entitled to the possession thereof merely because of some assertion of right on the part of the owner which, if ultimately established, might interfere with the accomplishment of some project of the plaintiff, in the carrying out of which project the plaintiff may have the right to ultimately acquire the lands in question.

In the case of *Lancaster vs. Kathleen Oil Co.*, 241 U. S., 551, cited by appellant, plaintiff had a lease of the lands and was entitled to immediate possession and the exercise of its rights under the lease for the mining and producing of oil and gas on the property, and was therefore held to be entitled to enjoin the defendant, who had taken possession of the land under an invalid lease, from operating thereunder. In this situation plaintiff's legal remedy of ejectment was quite naturally held to be inadequate and plaintiff's rights and the protection thereof by injunction quite properly the subject for equitable consideration.

In the case of *Bass vs. Metropolitan West Side El. R. Co.*, 82 Fed. 857, cited in appellant's brief as being a

case in which a Railroad Company was enjoined from using certain premises for railroad purposes although it was lawfully in possession thereof as lessee, it appears that plaintiff was the owner of the property and that the use of the property by the Railroad Company as lessee in the particular respect complained of was in violation of the provisions of the lease. The Railroad Company's act constituted a present infringement of plaintiff's rights and the fact that this might work a forfeiture of the lease and entitle the plaintiff to legal remedies would not preclude his resorting to equity for the enforcement of his rights as owner.

So in the cases of wrongful taking or appropriation of lands by a Railroad Company or other corporation from an owner, the existence of legal remedies by way of a suit for damages or a suit to compel appropriation will not preclude the owner from resorting to equity to enjoin such wrongful invasion. None of these cases have any application to the case at bar.

We submit that the view expressed by the District Court below, that it does not appear from the bill that the plaintiff's operations are at the present time interfered with by defendant's use of its property, is entirely justified by a careful analysis of the bill. Although it is alleged in the bill (par. eighteenth, record pages 10 and 11) that the defendant's use of these parcels "makes it impossible for the plaintiff to exercise its franchise or carry on its corporate purposes and that, if the defendants continue their use of said parcels, the State's grant and command to the plaintiff to develop hydro-electric power from the waters of said River will be nullified and the right of way and other property, rights, powers, privileges and franchises so granted to, acquired by and vested in the plaintiff as hereinabove alleged will

be permanently appropriated to the use of defendants," this conclusion is not in any manner supported by any averment of facts contained in the bill as distinguished from mere legal conclusions.

Confessedly, the plaintiff has no right to the possession or use of these parcels until it acquires them by purchase or condemnation from the owner. Until such time, therefore, no lawful use thereof by the owner can be truthfully said to interfere with plaintiff's franchise rights or prevent the exercise of any franchise rights by the plaintiff.

As we have heretofore shown, plaintiff acquired no exclusive franchise rights to the development of the waters of the Cuyahoga River by reason of its incorporation, and other property owners have the right to make use of these waters and possess and enjoy their own properties until such time as plaintiff shall have acquired them. So far as the plaintiff's charter is concerned, its exercise of any rights thereunder may involve a very extensive development of the River or a very small one and may be exercised in one locality or another within the general territory mentioned. The defendant is not preventing the plaintiff from going forward with the exercise of its franchise rights nor in any manner at this time interfering with or putting any obstacle in the way of its exercise of them, for when the plaintiff gets ready to appropriate this property in the ordinary method provided for that purpose, it would appear from the allegations of the bill that it can take the property, and no use which the defendant has in the meantime made of the property would in any way affect such right. Apparently, however, plaintiff has made no substantial progress since its incorporation in 1908 toward the exercise of its alleged franchise rights or the consumma-

tion of its grandios project of water power development, the exercise of its corporate powers having been devoted entirely to the institution of a large number of suits against persons and municipalities holding property on or making use of the Cuyahoga River.

The Court will perhaps recall that in its suit against the City of Akron, recently decided by this Court, (*Sears, Trustee, vs. City of Akron*, 246 U. S., 42), the plaintiff claimed that the City of Akron, in constructing its dam and other improvements in connection with developing the water supply of the City, had interfered with plaintiff's franchise rights and made it absolutely impossible for it to carry forward its project and had entirely nullified and made the project absolutely valueless. The City's rights however were upheld by the Court so that, if the allegations of the bill in that case are to be taken as true, plaintiff's project has already been made impossible of fulfillment and its alleged franchise rights entirely destroyed. However, we find it again in this action against the Traction Company asserting the franchise rights supposed to have been rendered valueless as the result of the previous litigation and claiming that the private use which defendant is making of its own property, and to which, concededly, the plaintiff has no present right of possession or enjoyment, is an interference with the same franchise rights and has again the effect of destroying them.

We submit that this use by the defendant is no present interference with or invasion of any rights which the plaintiff now possesses for the only right which the bill shows is the right to proceed with its proposed improvements and when it needs property therefor, owned by others, to acquire that property by purchase or condemnation, but the plaintiff says, quoting from page 53 of appellant's brief:

“* * * The Court below criticized the plaintiff because so far it has not done much for the public by way of improving the water power of the river (Rec. p. 38)—quite unmindful of the fact that the cloud which the defendants’ acts and claims have cast upon the plaintiff’s right to proceed, and which the Court has refused by its decree to remove, is the very cause and reason why the plaintiff has been so far unable to enter upon actual performance of its public functions. It seems inconsistent and rather unfair for the Court thus to criticise the plaintiff for not proceeding and at the same time refuse to give it that protection from interference which alone will enable it to proceed. A clear title is the first requisite of any enterprise; and a reasonable certainty of the right to complete an undertaking is, in a very real and practical sense, the *sine qua non* of its commencement.”

In other words, although the plaintiff may have done nothing itself toward the carrying forward of its enterprise and no one has actually interfered with any of its property rights or prevented it from proceeding with such enterprise, nevertheless, because certain property owners have made assertions that it had no right to take their property, such assertions constitute a cloud and make it, as a matter of policy, unwise to proceed until the right thus questioned has been adjudicated. This practical difficulty confronting it from the standpoint of business policy it is claimed entitles it to invoke the equitable jurisdiction of this Court. It appears, therefore, that this so-called cloud cast upon the enterprise forms the sole basis of its case, which must be sustained if at all, not on account of any present invasion of any actual property or franchise rights, but on the theory of a suit to quiet title.

In *Boston etc. Mining Company vs. Montana Ore Co.*, 188 U. S., 632, *supra*, the complainant, claiming to be the owner of certain mining properties, brought suit to enjoin the defendants from mining and extracting ores from the properties in question and sought to sustain the jurisdiction of the court by alleging that the defendants were asserting the right to take out the ore by reason of the claim that veins of ore comprised in certain neighboring mining patents owned by them apexed on complainant's property and that this involved the decision of certain matters in controversy involving the construction of statutes of the United States relative to purchasing and patenting mineral lands, and so presented a federal question. It was claimed that because of this assertion on the part of the defendants, the suit should be treated as one to quiet title and, as the question thus raised would involve the construction of the laws of the United States, the federal court therefore had jurisdiction. The lower court's dismissal of the bill for want of jurisdiction was sustained by this Court and Mr. Justice Peckham, in delivering the opinion of the court, has this to say in regard to federal jurisdiction on the theory of quieting title, which seems to us to be quite pertinent here: (Quoting from p. 640.)

"It is urged, however, on the part of the complainant that its averments in regard to the jurisdiction of the court are necessary to be set forth as a part of its cause of action, and that they show that the appellees are questioning complainant's title and interfering with its enjoyment of its property right by asserting ownership to a portion of such claim of complainant based upon two government patents issued for the Rarus and Johnstown claims respectively, and although such assertion of ownership of the appellees is, as complainant avers, without legal

foundation, yet, for reasons stated in the bill, the consideration of which necessitates an examination of Federal questions, the case is in effect one to quiet complainant's title or to prevent an interference with its rights and property, and complainant avers that the allegations of jurisdiction relate to its cause of action; that they state the controversy existing between the parties as to its subject matter, not as anticipatory of the defence, but as establishing the complainant's right to have its title quieted.

But it is plain that the suit is not in truth a suit to quiet title. There is a cause of action alleged that is not founded upon any such theory, to prove which it is not necessary or proper to go into the defendants' title or to anticipate their defence to the cause of action alleged by the complainant. What is thereafter said is for the purpose of showing jurisdiction in the Federal court, not over an equitable cause of action in the nature of a bill to quiet title, but over a cause of action arising out of the laws of the United States; and the various mining laws of the United States are cited to show the truth of the assertion. It is also clear that jurisdiction in a Federal court cannot be predicated in this case upon an assertion that it is brought to prevent a multiplicity of suits. Even then the complainant's proof in the first instance would remain the same as already stated. The frequent trespasses, as alleged, of the defendants, by reason of which an equitable remedy by injunction is sought, might exist, and still it would not necessarily appear from the complainant's proof that the defendant's justification arose by reason of an alleged right under the Constitution or laws of the United States. That might appear in the defense, but would constitute no cause of action by complainant.

If, however, the bill is to be looked upon as one in the nature of a bill of peace or to quiet title, it is fatally defective in that respect. There are two distinct kinds or classes of bill of peace, or bills to quiet title, the one brought for the purpose of establishing

a general right between a single party and numerous persons claiming distinct and individual interests; the other for the purpose of quieting complainant's title to land against a single adverse claimant. In the second class the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment, and in such case it is necessary to aver that the title of complainant has been established by at least one successful trial at law before equity will entertain jurisdiction. 3 Pom. Eq. Jur. 2d ed. § 1394, note 3, and 1 Pom. Eq. Jur. § 246.

This bill evidently would come under the second of these classes, and it is defective in not containing an averment that the complainant's title has been at least once successfully tried at law. On the contrary, it appears from the bill itself that an action at law has been commenced involving the same questions, but has not been tried.

It is also objected, that, as a bill of peace or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in such a bill. If not in possession, an action of ejectment would lie. The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a Federal court, unless it be alleged and proved that both parties are out of possession. *Whitehead vs. Shattuck*, 138 U. S., 146."

So far as the title to the actual land itself is concerned, it is manifest that the bill cannot be sustained as a suit to quiet title as the plaintiff is not the owner of the lands in question or in possession or even having the right to possession. Can it be sustained as a suit to quiet title to plaintiff's alleged franchise rights? Such a suit would certainly be an anomaly, but, even if it can be conceived that an action might lie in the nature of a suit to

quiet title where the subject matter involved was merely intangible franchise rights, we submit that the allegations of the bill here will support no such case or warrant a federal court's taking jurisdiction in equity.

It does not appear from the averments of the bill that anyone is at this time interfering with plaintiff's franchise rights or its exercise of them. The gist of the complaint when properly analyzed is the alleged assertion of the defendant that plaintiff has no right to take the lands away from it. In other words, it is said that when the plaintiff undertakes to appropriate these lands the defendant will then claim that it cannot do so because of defendant's public use of the property and that the defendant will set up this claim as a defense to such appropriation suit when brought, and that this, therefore, constitutes a cloud upon plaintiff's franchise. This, however, is merely pleading an anticipated defense and attempting thereby to obtain the jurisdiction of the federal court in thus setting up the alleged federal questions which would be involved in such defense. Jurisdiction cannot be obtained in this way under guise of a suit to quiet title when the necessary elements upon which any suit to quiet title is conditioned are not present. *Boston etc. Mining Company vs. Montana Ore Company, supra.*

We must confess to great difficulty in understanding the proposition of appellant's counsel that this action may be considered as a suit to quiet title to plaintiff's franchise. On page 6 of appellant's brief counsel say:

"We hence desire to emphasize at the outset that we make no claim of any right to oust the defendants from their possession, or of any right on the part of the plaintiff to take possession in advance of actual payment of compensation. The relief to which we insist the plaintiff is entitled in this suit is a decree

establishing its title to its franchise, *i. e.*, establishing its right to proceed with its enterprise, and removing the cloud cast upon its title by the defendants' assertions and claims that the plaintiff's rights have been defeated by their own purchase and use of the land, by enjoining the defendants from using the land *for power-development purposes* and from asserting such use as a bar to the plaintiff's right to acquire the land by the orderly processes of condemnation."

It is of course manifest from the bill that the plaintiff is asking much more than a decree merely establishing its title to its franchise or removing the cloud cast upon this franchise by the defendants' alleged assertion. To adjudicate merely as to whether the defendants' assertion is right or wrong would, as we have heretofore pointed out, be deciding a purely academic or moot question. The real purpose of the plaintiff's suit however is to enjoin the defendants from using the land for power house purposes and there is even a prayer that the power plants be actually turned over to the plaintiff and that a receiver be presently appointed for the property.

To enjoin the defendant from using its own land for its own purposes, these purposes being admittedly lawful, amounts of course to the same thing as depriving it of possession and taking the land from it. To deprive an owner of all beneficial use of his land for the purposes for which it is adapted and has been improved, results necessarily in a taking of the property within the meaning of the constitutional prohibition of such taking without compensation first made therefor.

We are unable to understand how appellant can claim to justify any such "taking of property" in advance of a legal appropriation thereof and payment of compensation made upon any theory of an equitable suit to quiet title.

It cannot be sustained as a suit to quiet title to real estate, because, as we have seen, all the conditions necessary for such suit are wholly lacking.

It cannot be sustained as a suit to quiet title to a franchise, because no one is now interfering with the exercise of the franchise, and because it seeks not merely to remove the so-called cloud by decreeing the validity of the franchise rights said to have been questioned (which would be merely deciding a moot question) but seeks to take property from an owner by enjoining any beneficial use thereof for his own purposes.

Appellant further contends that because the condemnation suit which it must needs otherwise bring to acquire the lands, must be brought in a state court, its sole legal remedy is, therefore, available only in a state court, while it is the settled rule that in order to defeat the equity jurisdiction of the federal court the legal remedy must be one available in a federal court.

We submit that this rule of federal practice has no application to the situation here. The equity jurisdiction of a federal court which cannot be defeated by the existence of a legal remedy in the state court under the rule above quoted is only the equitable jurisdiction which a federal court would have whenever the established principles and rules of equity permit a suit of the character in question to be brought in that court. When that equitable jurisdiction under such established principles is shown to exist, then and then only the plaintiff cannot be deprived of its right to sue in equity by reason of the existence of some legal remedy under a state statute. *McConihay vs. Wright*, 121 U. S., 201; *Smyth vs. Ames*, 169 U. S. 466.

In *McConihay vs. Wright* the plaintiff brought suit to quiet title and had *under established equitable princi-*

ples the right to bring such suit, he being in possession of the land in question and the defendant, claiming an adverse title, being out of possession. It was claimed however that, inasmuch as a statute of West Virginia allowed an action of ejectment to be brought against one claiming title to land although not in possession, the existence of this legal remedy of ejectment allowed under the state statute defeated the equitable jurisdiction of the federal court. In this connection the court, quoting from page 205 of the opinion by Mr. Justice Mathews, said:

“* * * The contention of the appellants, however, is that by the statute of West Virginia, the complainant might have maintained an action of ejectment. Reference is made in support of this contention to the West Virginia Code of 1868, c. 90, to show that an action of ejectment in that state will lie against one claiming title to or interest in land, although not in possession. Admitting this to be so, it nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and Acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving, in like cases, a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress.”

The principle governing equitable jurisdiction in a suit to quiet title which obtains in federal courts and

which, as we have seen, is conditioned upon the party bringing such suit being in possession of the land in question, is based upon the fact that, if out of possession, the ordinary legal remedy of ejectment would lie. This being so it would make no difference and would not enlarge the equitable jurisdiction of the federal court, if such action of ejectment should for other reasons, such as lack of diverse citizenship where no federal question is involved, need to be brought in a state court. In other words, the equitable jurisdiction of the federal court cannot be enlarged merely because legal remedies are only available in a state court. The rule referred to by appellant applies only to an attempt to deprive a federal court of equitable jurisdiction which would otherwise exist and thereby limit or restrict its jurisdiction because of the existence of some legal remedy under some special state statute.

We submit that there is no principle of equitable jurisdiction of the federal courts otherwise existing through which the property of an owner can be taken from him by a corporation in advance of the completion of condemnation proceedings and payment of compensation, and that this taking cannot be effected under the guise of a suit to quiet title and federal equity jurisdiction thereby acquired on the theory that the legal remedy of condemnation is available only in a state court.

IV.

Under the circumstances set forth in the Bill appellant cannot now resort to the equitable remedy of injunction here sought.

The plaintiff adopted the plan for its proposed hydro-electric project and adopted the appropriating reso-

lution set forth in the bill in June, 1908, and at once instituted appropriation proceedings against the owners of the lands in question, to which proceedings it made the Traction Company a party. The Traction Company at that time was the legal owner of the A. B. and C. parcel and claimed an equitable interest in the Everett parcel, legal title to which then stood in Mr. Everett, the then President of the Company. This appropriation suit the bill does not aver to be pending and it would be a fair implication from the pleadings that it has either been determined adversely to the plaintiff or has been allowed to lapse. As a matter of fact as above shown, this suit was long ago dismissed by plaintiff at the time it commenced the second proceeding next referred to.

In December, 1910, the Everett parcel was conveyed to The Northern Realty Company and in July, 1911, the Sackett parcel was acquired by The Northern Ohio Power Company, which in the same year took title to the Everett parcel from The Northern Realty Company and in February, 1914, conveyed both the Sackett and Everett parcels to the defendant, The Northern Ohio Traction and Light Company. In January, 1911, plaintiff commenced condemnation proceedings against The Northern Realty Company to appropriate the Everett parcel. The A. B. and C. parcel was included in this suit but, as The Northern Realty Company was made the sole defendant, that suit could not affect that parcel. The original condemnation suit of June, 1908, having been abandoned so far as these parcels are concerned, reliance must be placed solely upon the suit of January 20th, 1911, which appellant says was diligently prosecuted and at the time of the commencement of this proceeding was pending in the Supreme Court of the United States upon

writ of error from the Ohio Court of Appeals, which had decided it adversely to the defendant.

It now appears from the records of this Court that this sole remaining suit against The Northern Realty Company has been determined and plaintiff's right to appropriate the lands involved therein finally adjudicated against it.

While this last named appropriation suit was pending and as the bill avers, between January 31st, 1911, and February 24th, 1914, the steam power plant and hydro-electric plant were constructed on the premises in question through the expenditure of large sums of money therefor by the defendants. The Traction Company abandoned its other power houses for the new plants thus constructed, which it continued to extend and improve down to the commencement of this suit in August, 1916, expending large sums of money therefor and employing the power derived from these plants to the operation of its street and interurban railway systems. Plaintiff of course had full knowledge of the erection of these structures and their use by the defendant and the fact that large sums of money, to the extent of several millions of dollars, were being expended thereon. It took no action, however, to enjoin this use of the property by the defendant, but permitted it to go forward with these large expenditures, relying entirely upon its legal remedy through the prosecution of the appropriation suit which it had brought. It was not until its appropriation suit had been decided adversely to it in the highest court of the State that, in August, 1916, eight years after the adoption of its appropriating resolutions, after it had stood by and seen the expenditure of several million dollars in the improvement of this property, that the plaintiff seeks, by injunction, to acquire the lands which

it has failed or been unable to acquire through the ordinary process of legal appropriation.

Irrespective of what the doctrine may be with respect to the preferential right of the first locator as between rival companies seeking to appropriate for a public use, and irrespective of whether under this doctrine as contended for in appellant's brief, the plaintiff might, as a prior locating company, have in 1911, when these improvements were commenced, enjoined their construction and the use of the property therefor during the pendency of suits for their legal appropriation, nevertheless, we submit that, having stood by and seen these improvements go forward, involving the expenditure of large sums, the issuance of bonds and their sale to investors secured by mortgage upon the properties in question, it cannot now, when its legal suits have been allowed to lapse or been decided adversely to it, seek to litigate its rights in a court of equity and take away these valuable properties by the equitable process of injunction. If it has any rights under the facts set forth in its bill, these rights can be enforced by the ordinary legal proceedings provided therefor. If its rights are as it claims, it can condemn and appropriate these properties, but it ought not to be permitted at this late date to forestall such proceedings by attempting to acquire them in an equitable suit.

This situation makes applicable the language of Mr. Justice Clarke, then District Judge of the Northern District of Ohio, in deciding one of these cases brought by the Trustee of the Power Company's bond issue against the City of Akron, involving similar claims, the opinion appearing in the printed record in *Sears, Trustee, vs. City of Akron*, on file in this Court, from which we quote the following:

“* * * The Trustee whose rights cannot rise higher than those of the creditors he represents, did not begin this suit, until as we have said, within six days of the time when the city had announced that it was about to make use of the completed construction which must have cost a very large sum of money.

These facts must be taken into consideration when a chancellor is asked to enjoin a great public improvement, and by his order inconvenience the inhabitants of a city with approximately 100,000 inhabitants.

Such a state of facts makes sharply applicable the decision of the Supreme Court of United States in *New York City vs. Pine*, 185 U. S. 93, a case with many features not greatly different from the one at bar. Here the plaintiff sought to enjoin the city of New York from the use of the water of a river after it had expended a large sum of money in providing for use of such water. The court discussing elaborately the law applicable to such a state of facts, says:

‘The time at which parties invoke the aid of a court of equity is often a significant factor in determining the extent of their rights. *Vigilantibus non dormientibus aequitas subvenit* is a maxim of equity.’ (p. 98) * * * The court quotes with approval from *Smith vs. Clay*, 3 Brown Ch. 639, as follows:

‘A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence.’ ”

We submit that the situation thus disclosed by the bill cannot appeal to the conscience of the Chancellor to permit the invoking of the equitable remedy of injunc-

tion to deprive defendant of the use of its property and disturb the operation of a great street railroad system serving these populous communities.

CONCLUSION.

Plaintiff's case reduces to the proposition that by its incorporation under general laws and a mere resolution of its Board of Directors private owners of many miles of lands in the Cuyahoga River valley are divested of their property and prevented from using or improving the same.

It is averred that under certain legislation of the state the plaintiff took out its articles of incorporation and organized itself to construct a certain public improvement in a certain location. Granting, for the purpose of the argument, the broadest claim which plaintiff can make as to the effect of its franchise as giving it priority of right to appropriate property in the desired location, it is clear that these proceedings do not give it any title to privately owned lands in that location. They simply confer a potential prior right to procure such lands, but do not in themselves in anywise affect the titles of private owners to, or their right to make such use as they please of those lands until they are appropriated by legal process.

Granting further that the resolutions from time to time adopted by the Board of Directors of plaintiff were a preliminary step toward the appropriation of the lands desired, it is yet clear that these resolutions, joined with the prior proceedings, did not procure for the plaintiff the lands desired, nor divest their owners of the lands or the right to use them as they saw fit until such time as

the plaintiff should, in the manner provided by the laws of the state, appropriate these properties and become entitled to the possession of them.

It is equally clear, upon the averments of the complaint, that the plaintiff has never reached a point at which it completed appropriation proceedings and became entitled to the possession of the properties in question.

Until that time the appropriating company has only the potential right to appropriate, while, subject to that right, the owner of the legal title is entirely unhampered in his use of his own property. He may sell it, and the purchaser acquires all his rights. There is nothing which prevents the passage of legal title with all the rights appertaining thereto, subject always, however, to the hazard that the appropriating company may complete its proceedings and take the property from the owner.

It may be broadly conceded further, for the purposes of this argument, that no purchaser of property under those circumstances gets any better or higher rights than the original owner at the time the appropriation proceedings were begun, and that this defendant, therefore, now holds these properties subject to every potential right which the plaintiff, by its incorporation and subsequent procedure, acquired.

The bill avers that the defendant has built upon premises to which it has legal title, having purchased the same from the earlier owners thereof, a plant for generating electricity to operate its cars, a thing which according to its articles of incorporation it has full power to do. It is not claimed that it occupies, takes water from, or uses lands owned by anyone else.

We have here, then, the simple proposition that the legal owner of the lands, which have not been appro-

priated by the plaintiff or anyone else, is using them for an entirely lawful purpose. Moreover the bill avers, and for the purposes of the motion to dismiss it is admitted, that this use by the defendant is purely a private and not a public use. Indeed it is not averred in the bill that the defendant markets or sells any electrical energy whatever, the averment being that it simply uses it for propelling its own cars.

It may be broadly conceded, then, for the purposes of such motion, that the defendant acquired title to the properties in question and is using them subject to and at the hazard of all the rights acquired by the plaintiff in its incorporation proceedings and by reason of such steps, if any, as it has taken toward the appropriation thereof while said properties were in the hands of prior owners or in those of this defendant.

It must follow from this state of facts alleged in the bill that whenever the plaintiff completes its appropriation of these properties, by having damages therefor assessed, and pays the money into court, the defendant must retire and lose the benefit of all the construction it has placed thereon at its own hazard.

The bill of complaint clearly admits that the plaintiff has never reached this point, and that, therefore, it has acquired no actual right to the possession of these properties, or any of them, or to interfere with such use as their owner may be pleased to make of them.

This is the gist of the whole matter, and it would seem to present a proposition so simple and plain as to need no citation of authorities.

Of no possible materiality, therefore, can be the averments of the bill that the defendant claims, or is going to claim when the plaintiff attempts to appropriate, that its use of its own properties in generating its own

power is a public use which cannot be taken from it. This is not a moot court to try out in advance purely academic questions, nor can any claim which it is said the defendant will set up as a defense to such condemnation suit affect the facts admitted for the purpose of a demurrer to the bill, or the law applicable thereto. The pleading of such anticipated defense cannot confer equitable jurisdiction, nor can the averments of the bill as to the unconstitutionality of certain legislation of Ohio said to be involved in such claim become material or form the basis of federal jurisdiction.

Moreover in addition to these plain reasons showing an entire want of equity in the bill, there is the additional reason that the plaintiff, in reliance upon its legal remedy of condemnation, has stood by for many years while defendant has expended large sums in improving its properties and at this late date brings this proceeding to take from the defendant, by equitable process and without payment or tender of compensation, the property plainly recoverable in such legal action if the facts set forth in its bill are true.

Upon the averments of the bill it is not possible to imagine why the plaintiff is dodging the direct and open road which all this time has lain before it, and seeking, by some roundabout process, in this action as well as in the many others referred to in the briefs, to hamper and harass someone else instead of proceeding with its own business.

There is no reason apparent upon the face of this bill why the plaintiff may not and does not proceed to appropriate these properties by condemnation, unless it fears that the facts claimed by it are not true, or that its legal theories are untenable.

Respectfully submitted,

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T. H. HOGGETT,
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Counsel for Appellees.

December, 1919.

FEB 1 1928

AMES S. BAKER,
CLERK

No. 108

RECEIVED

IN THE

Supreme Court of the United States

THE CUYAHOGA RIVER POWER COMPANY, Appellant,

THE NORTHERN OHIO TRACTION AND LIGHT
COMPANY and THE NORTHERN OHIO POWER
COMPANY, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

SUPPLEMENTAL BRIEF FOR APPELLEES.

J. S. CLARK,
Counsel for Appellees.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 102.

The Cuyahoga River Power Company, Appellant,

vs.

*The Northern Ohio Traction and Light Company and the
Northern Ohio Power Company, Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF OHIO, EAST-
ERN DIVISION.

SUPPLEMENTAL BRIEF FOR APPELLEES

The alleged rights of the plaintiff Power Company to construct a system of hydro-electric plants on the waters of the Cuyahoga and other rivers have been the subject of judicial investigation in the following cases:—

1. *Cuyahoga River Power Company vs. Northern Realty Company and Northern Ohio Traction & Light Company*, 244 U. S. 298, 61 L. ed. 1153;

2. Cuyahoga River Power Company *vs.* City of Akron, 210 Fed. 524, 240 U. S. 462;
3. Sears *vs.* City of Akron, 246 U. S. 242, 62 L. ed. 688;
4. Sears *vs.* Northern Ohio Traction & Light Company, U. S. District Court for Northern District of Ohio. (See opinion, Appendix to original brief for appellees, pages 13-23.)

The present case is the fifth case in which plaintiff Power Company has asserted the same rights. The first case named above was an action at law to appropriate by condemnation the same three pieces or parcels of land which the Power Company is endeavoring to acquire by a receiver in the present case. The present case and the other three cases named above are suits in equity instituted for the purpose of appealing to the Chancellor to protect the Power Company's alleged legal rights. The legal right, which the Power Company claims, is the right to appropriate the properties necessary for the carrying out of its pretentious and extravagant scheme. The first suit mentioned above was a condemnation proceeding and the Court denied the Power Company's alleged right of condemnation. There was an earlier condemnation suit mentioned in paragraph seventh of the Bill, but this suit was dismissed, as appears on page 3 of the Transcript of Record, in the condemnation suit which came to this Court, and is reported in 244 U. S. 298. This alleged right of condemnation is the pivot around which this mass of litigation revolves. A court of competent jurisdiction has denied that the Power Company has any such right. It is elementary that a court of equity will not entertain a proceeding to protect an alleged legal right, unless that right has been established at law or is clear and the violation of the right is palpable. On this subject see the following cases:—

Parker vs. The Winnepesaukee Lake Cotton and Woolen Co., 67 U. S. 545, 17 L. ed. 333;
Consolidated Canal Company vs. Mesa Canal Co., 177 U. S. 296, 44 L. ed. 777.

The bill does not show that the Power Company lost its condemnation suit, but that fact appears by the records of this Court and the Court will take judicial notice of the facts shown by its own records. In *Dimmick vs. Tompkins*, 194 U. S. 540, in which this question was presented, the Court said:—

“In a case like this the Court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. The principle permitting it is announced in the following cases: *Butler vs. Eaton*, 141 U. S. 240, 242, 35 L. ed. 713, 714, 11 Sup. Ct. Rep. 985; *Craemer vs. Washington*, 168 U. S. 124, 129, 42 L. ed. 407, 409, 18 Sup. Ct. Rep. 1; *Bienville Water Supply Co. vs. Mobile*, 186 U. S. 212, 217, 46 L. ed. 1132, 1135, 22 Sup. Ct. Rep. 820.”

It will assist to a better understanding of the issues presented in the present case if we will examine the several cases cited above in which the Power Company's claims have been considered.

I. CUYAHOGA RIVER POWER COMPANY *vs.* NORTHERN REALTY COMPANY, AND NORTHERN OHIO TRACTION COMPANY, 244 U. S. 298.

A full statement of the facts appears in the opinion of this Court, 244 U. S. 298. This condemnation suit was tried in the Common Pleas Court of Summit County, Ohio, which dismissed the petition on May 1st, 1914 (Transcript of Record in said case, page 232). This action was affirmed by judgment of the Court of Appeals of the Eighth District of Ohio. The Power Company endeavored to take the case to the Supreme Court of Ohio on the ground that a constitutional question was involved, but that Court refused to take jurisdiction. The Power Company then brought the case to this Court by writ of error to the Court

of Appeals of the Eighth District. This Court dismissed the case for want of jurisdiction (June 4th, 1917), holding that the Ohio Court—

"must be regarded as having rested its judgment dismissing condemnation proceedings on its decision of the preliminary questions raised, i. e., the existence of the petitioning corporation, its right to make the appropriation, its inability to agree as to the compensation to be paid for the property, and the necessity for appropriation,—grounds broad enough to sustain the judgment irrespective of the merits of the Federal question involved in the defense concerning the public character of the use to which the owner of the property sought to be condemned had applied it, and the consequent want of authority to take it for the benefit of the petitioning corporation" (Syllabus, point 2).

It might be true that the Power Company lost this condemnation suit because it had failed to establish any one of certain preliminary questions, as, for example, its inability to agree as to the compensation to be paid for the property. On the other hand, it may have failed to establish certain other preliminary questions as, for example, its existence, or its right to make the appropriation or the necessity for the appropriation. The third point of the syllabus reads as follows:—

"The Federal Supreme Court will not take jurisdiction of a writ of error to a State Court where the absence of an opinion by the Court below makes it impossible to say whether its judgment rested upon State questions adequate to sustain it, independent of the Federal question, both being in the case."

No effort has been made by the Power Company to secure relief from this adverse judgment in the condemnation suit other than the writ of error mentioned above, in which it was unsuccessful. If the difficulty in the trial Court was

failure to establish inability to agree; that point should have been made clear by the record. If that was the situation presented, the Power Company should have moved to dismiss the case and it should then have proceeded to negotiate with the land owner for an agreement upon the compensation to be paid, and, if such an agreement could not be made, then it could have instituted a new condemnation suit. The record of the condemnation suit filed in this Court gives no indication of the particular point upon which the suit was decided against the Power Company. It is clear, however, that the Power Company was unable to establish its right to condemnation and it is a fair conclusion that such an alleged right does not in fact exist. The most favorable view that can be taken for the Power Company is that its alleged right to condemn is extremely doubtful. A court of equity will not take jurisdiction to protect any such doubtful legal right.

II. CUYAHOGA RIVER POWER COMPANY vs. CITY OF AKRON, 210 Fed. 524.

This was a suit in equity by the same Cuyahoga River Power Company. It asserted in its bill, which was filed July 14th, 1913, practically the same rights asserted by it in the bill filed in the present case. The City of Akron, defendant, proposed to construct water works in the valley of the Cuyahoga River and to furnish water to the inhabitants of the city. The city evidenced its intention by passing an appropriate ordinance. The bill asked for an injunction against the city to prevent it from appropriating the waters of the river on the ground that it (the Power Company) had already appropriated these waters for its own hydro-electric purposes. The defendants filed a motion to dismiss, which was granted, the Court filing an elaborate opinion which is reported in 210 Fed. 524. The Power Company appealed the case to this Court which, on March 26th, 1916, reversed the District Court and sent the case back to be dealt with on the merits (240 U. S. 462). This Court held that the District Court had not paid sufficient

attention to certain allegations of the bill and that whether the plaintiff had any rights that the city was bound to respect could be decided only by taking jurisdiction of the case. Apparently the Power Company has taken no further proceedings in the District Court in that case, probably because it determined that it would be wiser for it to proceed with the case of *Sears vs. Akron*, the bill in which contains certain allegations which were not contained in the bill filed in *Cuyahoga River Power Company vs. Akron*.

III. SEARS *vs.* CITY OF AKRON, 246 U. S. 242.

This was a suit in equity instituted by John H. Sears, the trustee under the mortgage given by the Cuyahoga River Power Company, in which the bill, filed July 24th, 1915, contains practically the same allegations as the bill in the present case, and allegations in some respects more definite than those in the bill filed in *Cuyahoga River Power Company vs. Akron*. In this as in every one of these equity cases, a motion to dismiss was made and granted. The opinion filed in the District Court upon that motion in *Sears vs. Akron*, is printed in the Appendix to the original brief filed on behalf of appellees, pages 1 to 11, inclusive. The basis for the granting of the motion to dismiss is stated in the opinion filed in this Court March 4th, 1918, in the following language:—

“The motion to dismiss the bill was sustained by the District Court, on the ground that the company did not possess any such contract, right or property as the city was alleged to have impaired or invaded or threatened to appropriate; and also on the ground that the bill did not set forth facts entitling plaintiff to seek relief in equity and did disclose laches.”

That part of the opinion of the District Court which sustains the defense of laches is printed on page 42 of the original brief for appellees. This Court did not discuss the question of laches, but, under the facts alleged in the

bill in the present case, and particularly in the light of what is said on this subject in the original brief for the appellees, the laches of the plaintiff Power Company, appearing upon the face of the bill, is a sufficient ground for sustaining the motion to dismiss.

Plaintiff Power Company apparently relies in the present case upon its alleged contract and property rights under its charter and the adoption of its plan of development, just as it did in the case of *Sears vs. Akron*. Its alleged contract rights were denied by this Court in its opinion in that case. That part of the opinion which disposes of that question is quoted on page 16 of the original brief filed on behalf of the appellees. That decision disposes of plaintiff's alleged contract rights. This Court then proceeded in its opinion in *Sears vs. Akron* (page 249) to consider plaintiff's alleged property rights and used the following language:—

"*Second.*—As to the alleged property rights: It follows from what has been said above that, at least until something more had occurred than incorporation, the city was free as against the Cuyahoga Company to appropriate any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan, or (b) when condemnation proceedings were begun. Whether the adoption of a plan by the company would, under the General Laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider. For it is clear that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken (*Adirondack R. Co. vs. New York*, 176 U. S. 335, 44 L. Ed. 492, 20 Sup. Ct. Rep. 460),

and the Act of 1911 and the ordinance were both passed before the company had acquired any property."

Counsel for the appellant point out very clearly in their brief that this Court expressly did not pass upon any rights that might have been acquired by the Power Company as the result of the adoption of the plan, or as the result of the commencement of condemnation proceedings, for the reason that the Act of 1911 and the ordinance passed in pursuance thereof operated to revoke any charter rights which the company might otherwise have had to acquire conflicting property rights. In the present case there is no such legislation interfering with the acquisition of property rights by the Power Company. Counsel for the Power Company therefore argue that there is nothing in this decision in *Sears vs. Akron* which interferes with their proposition that the adoption of their plan and the commencement of condemnation proceedings vested rights in the Power Company which it can assert in the present proceeding. It is true that the appellees in the present proceeding have not the same defense to this proposition which the city of Akron had, based upon the Act of 1911 and the ordinance of the city passed in pursuance thereof. It does not follow, however, that the plaintiff Power Company has shown any right to relief in equity. This question is fully discussed at a later point in this brief.

This Court, in *Sears vs. Akron*, proceeded under the third heading (pages 250-257) to consider the Power Company's alleged riparian rights and stated that:—

"the city insists that the bill fails to show that it has taken, or proposes to take, or will injure any of these, and also that it does not appear that the company has, in respect to any of these properties, any riparian right which conceivably could be taken or injured. This contention, which involves matters of State law, may possibly raise some questions presented to the State Court in *Boettler vs. Akron*, 93 Ohio State, 490, 113 N. E. 1069. But whether it is in all respects sound,

we need not determine; for it is clear that upon the facts alleged in the bill, the rights of the plaintiff in this property and the injury thereto, if any are not such as to entitle him to relief in equity."

The Court also said (page 253):—

"The absence of facts entitling plaintiff to equitable relief is not supplied by such general allegations of fraud or insolvency as the plaintiff has made."

The facts alleged in the bill in the case under discussion are practically the same as the facts alleged in the bill in the present case, but there is no allegation of insolvency in the present case. If in that case the allegations of the bill were not such as to entitle the plaintiff to relief in equity, the same result must follow in the present case.

IV. SEARS *vs.* THE NORTHERN OHIO TRACTION AND LIGHT COMPANY AND THE NORTHERN OHIO POWER COMPANY, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO (see opinion, Appendix to plaintiff's original brief, pages 13 to 23).

This was another suit in equity filed by Sears, the mortgage trustee, against the defendants in the present case. The allegations of the bill are practically the same as those in the bill filed in the present case. The defendants made the usual motion to dismiss, which, as usual, was granted. This motion was based upon two grounds, which were described in the opinion of the District Court (Appendix to original brief of appellees, page 1), as follows:—

"*First*.—Because the bill does not state a cause of action within the equity jurisdiction of this Court, and

"*Second*.—Because the alleged property rights and interests of the plaintiff had been adjudicated, or are now pending for final adjudication, in the Supreme Court of the United States."

On the first ground the Court held that there was no allegation of insolvency and the mortgage trustee had an adequate remedy at law in a suit for damages. The same is true in the present case, for the bill contains no allegation of insolvency. In the above-named case the District Court further said (Appendix, page 21), in speaking of the right to condemn properties required by the Power Company for its corporate purposes:—

"If the appropriation case, if there is but one, or cases, if there are two, are such as the plaintiff alleges that they are, the decision of them will determine the rights of the plaintiff grantor in the premises described in the bill in this case."

The appropriation case referred to is Cuyahoga River Power Company *vs.* Northern Realty Company and Northern Ohio Traction and Light Company, *supra*, which, as shown above, resulted in a defeat for the plaintiff Power Company. This result, as we contend and as was the view of the District Judge, according to the above quotation, is a complete defense to the plaintiff Power Company's claims. The District Court further said:—

"The conclusion which we have reached also calls for the dismissal of the bill upon the second ground of the motion filed, viz: because the alleged property rights of the plaintiff have been adjudicated in the case which is now pending for review in the Supreme Court of the United States. It is difficult, as we have said, to discover any substantial difference in the claims asserted in the bill filed in this case from those asserted in the case commenced in this Court by this same plaintiff in July, 1915, which is now pending in the Supreme Court of the United States, and there can be no doubt that the disposition of that case will dispose of this one. For this reason also the motion of defendant to dismiss the bill will be sustained."

The case referred to as then pending in this Court is the case of *Sears vs. Akron*, discussed in full above. Although this Court did not in that case determine the nature and extent of the plaintiff Power Company's alleged rights arising out of its charter and the adoption of its plan, it did decide that there was an absence of facts entitling plaintiff to equitable relief. Although the plaintiff Power Company is not barred by this decision in *Sears vs. Akron* on the theory of *res adjudicata*, as the defendants and appellees in the present case were not parties to the former one, the decision was none the less rendered upon consideration of the same set of facts as are set forth in the bill in the present case.

No appeal has been taken from the decision of the District Court in *Sears vs. The Northern Ohio Traction and Light Company and The Northern Ohio Power Company* sustaining the motion to dismiss.

V. PRESENT CASE.

In the present case the usual motion to dismiss was made in the District Court and was, as usual, sustained. The reason given for the motion was "that the facts therein set up do not entitle the plaintiff to the equitable relief demanded." The Court said (Record, page 38):—

"The contention of the plaintiff is that by virtue of its charter it has appropriated the potentialities of the river and its tributaries within the boundaries by it designated in its resolution of improvement, and that it is entitled, because of its incorporation under the General Laws of the State, to exclude any use of the water power of these streams of the nature of the use which it anticipates enjoying in the future, while it proceeds, however dilatorily, to make its improvements in detail and to complete its ambitious scheme. In brief, its proposition is that its charter is equivalent to a contract with the State of Ohio, giving it the exclusive right to the employment of the benefits which nature

has conferred upon the public through the forces of these streams to the end that until it finds itself able to completely occupy all the territory which it has privately designated to be necessary for its use, the public shall not have the advantage of any portion not immediately occupied by it through the employment of the resources thereof by another public utility company."

The Court held that this is the controlling question in the case and said further (Record, page 40):—

"It is not necessary to determine to grant this motion, whether or not complainant has an adequate remedy at law. It may be that the Traction Company's occupancy of its own properties for the purposes complained of is subordinate to the rights of the complainant under its charter, but, if so, that subordination does not exist until the complainant has completed the steps required by law by which only it has acquired the dominant and exclusive interest. Conceding, without deciding, that it may hereafter so subordinate the rights of the Traction Company to its own right and, by enforcing the latter, to exclude the Traction Company from its present use of the water power and privileges generated on the latter's own property, pending that time we see no reason why the State of Ohio might not permit the Traction Company to convey, through the improvement of its own property, to the public the favors which nature has there provided."

The District Court further said (Record, page 40):—

"We are compelled to conclude that there is no equity in complainant's contention respecting the affect of its charter."

The Power Company, complainant, relies in the present case not only upon its charter, but upon the adoption of

its plan by its Board of Directors. It claims that the adoption of its plan, in pursuance of its charter rights, creates an equity in its favor which it is entitled to assert against the Northern Ohio Traction and Light Company in the present case and upon the faith of which it is entitled to the equitable relief prayed for in its bill. It will be remembered that in *Sears vs. Akron*, *supra*, this Court did not determine whether the resolution of the Board of Directors adopting the plan, in pursuance of the charter rights of the Power Company, vested any right in that company to equitable relief, holding that it was not necessary to decide this question, in view of the fact that the charter rights of the Power Company had been altered and modified by the passage of the Act of 1911 authorizing the city of Akron to proceed with the construction of its water works. In *Sears vs. Akron* this Court, however, did decide that the facts alleged in the bill "are not such as entitle him (Sears) to relief in equity." The Power Company no doubt contends that the decision on this point was materially influenced by the fact that its charter rights were modified and altered, so far as the city of Akron was concerned, by the Act of 1911, but that its rights, so far as the Northern Ohio Traction and Light Company is concerned, cannot be affected by that Act.

It may be true that the decision of this Court on this point was influenced by the effect of the Act of 1911, but apparently, from the language of the opinion, this Court intended to hold that, independent of the Act of 1911, the plaintiff's Bill in that case failed to disclose any right to equitable relief.

In considering the question whether, under the law of Ohio, the adoption of a plan by the board of directors creates in favor of the corporation a prior right and entitles the corporation to enjoin all other similar corporations from interfering with the location so acquired, the District Court in the present case said (Record, page 39):—

"Whatever may be the fact in other jurisdictions, depending upon provisions of other constitutions or

laws, or the constructions thereof by other courts, it is thought by this Court that in Ohio the mere charter of a company for the utilization of natural resources for the public benefit does not constitute a definite and excluding contract for the use of such resources; that in the words of some of the argument here, the complainant acquired nothing more through its charter than a potentiality which amplifies into an actual exclusive possession only as it complies with the conditions of the laws of the State to the completion of appropriation proceedings. * * * It is not true in Ohio that the character of complainant gave to it 'a vested right seemingly unlimited in time to exclude the rest of the world from its water sheds it chose' simply by declaring by resolution just what territory it hoped in the future to occupy to carry out its purposes."

The District Court refers to and relies upon its former decisions in the two Sears' cases, which were to the same effect on this point. This question has been fully presented with the authorities and argued in the original brief filed on behalf of the appellees. If the position there taken is sound, the plaintiff Power Company has failed to show any prior right and therefore no right to oust the Northern Ohio Traction and Light Company from the properties which it is now occupying in serving the public. If, on the other hand, the law of Ohio on this question is the same as the law in certain other States, as claimed by plaintiff Power Company, the decisions in which have been cited by it and upon which it apparently relies with much confidence, it does not follow that said company has shown any right to relief in the present proceeding. The general proposition upon which plaintiff Power Company relies to establish its right to a prior location may be sound in other jurisdictions, where the conflicting rights of railroad companies over their respective rights of way are involved. It is undoubtedly true that there are a great many cases in States other than Ohio in which a railroad company is held to

have acquired a prior location by the adoption of a route by proper resolution of its board of directors, and by filing a plan, if such filing is required, and said railroad company is entitled to an injunction against another railroad company, whose alleged rights were subsequently acquired, restraining it from interfering with that route. Even if this was the law of Ohio, plaintiff Power Company would have several difficulties to overcome before it could succeed in establishing its right to relief in the present case.

1. The fact that plaintiff Power Company has heretofore endeavored to condemn from the appellee, Northern Ohio Traction and Light Company the same tracts or parcels of land which it is endeavoring to acquire through a Receiver in the present proceeding, and that its right of condemnation has been denied by a court of competent jurisdiction, is a complete bar to any relief by the Power Company in the present case.

2. The fact that Sears, the mortgage trustee of the plaintiff company, failed to secure any relief in his suit against the city of Akron, and by reason thereof plaintiff Power Company's scheme for hydro-electric development cannot be consummated, places plaintiff Power Company in a position where it cannot interfere with the rights of any property owners to secure protection for it in aid of a plan of development which it is no longer possible for it to complete.

3. If there is any doubt about the final denial of plaintiff Power Company's right of condemnation, as suggested in paragraph 1 above, or any doubt of the soundness of the conclusion in paragraph 2 above, either one or both of said propositions show that plaintiff's alleged legal rights are, to say the least, of doubtful validity, and a court of equity will not interfere in aid of doubtful legal rights.

4. This is not a case of a contest between two rival Railroad Companies endeavoring to secure the same strip of

land for their respective rights of way. The Northern Ohio Traction and Light Company acquired the lands involved in the present case many years ago, and is lawfully in possession of them, using them for its own proper corporate purposes. The Bill in paragraph fourteenth alleges that the Traction Company has five different power houses located at various points, and that there is nothing which makes it necessary for said Company to own and possess the several tracts of land described in these proceedings, or to obtain power from the power plants erected thereon. If, therefore, plaintiff Power Company succeeds in establishing its prior right by notice of the adoption of its plan, which of course we insist it cannot do, and the time arrives when the Power Company is ready to exercise this right, the Traction Company will have to turn over the possession of these properties, just as any individual landowner would be required to do. Until that time arrives the Traction Company must be allowed to continue in possession and use of the properties for its corporate purposes.

5. Even if it be true that one Railroad Company with a prior location may enjoin another Railroad Company with a subsequent location from appropriating any part of the route upon which the first Company has the prior location, it does not follow that a hydro-electric company claiming a prior location upon hundreds of miles of territory for an extravagant and pretentious scheme of development can secure relief in equity against a property owner prior to condemnation, and the payment of compensation, even though that property owner is a *quasi* public corporation and asserts a claim of prior right for public purposes vested in itself.

6. The Bill in paragraph sixteenth alleges that the Traction Company has not and never has had any right or franchise to exercise the power of eminent domain. If this is true, plaintiff Power Company does not need the protection of a court of equity from preventing its property from being

appropriated by the Traction Company which, under the allegations of this paragraph of the Bill, has no power to appropriate it, nor is there any danger that plaintiff Power Company will be deprived of its property without due process of law and without compensation.

7. Paragraph twelfth of the Bill alleges that between January 31st, 1911, and February 24th, 1914, the Northern Ohio Power Company constructed a power house and improvements upon the tracts of land which the plaintiff Power Company wants to acquire through a receiver in this proceeding. Paragraph tenth alleges that on February 24th, 1914, the Northern Ohio Power Company sold and conveyed these properties to the Northern Ohio Traction and Light Company. The record shows that the Bill in the present case was sworn to on August 4th, 1916. It must have been filed on that day or shortly thereafter, that is, about two and one-half years after the power house and other improvements located on these lands were constructed and completed. These facts establish a clear case of laches, which of itself is sufficient to authorize and require a dismissal of the Bill.

Plaintiff Power Company in order to establish an equity in its favor, no doubt relies upon the allegation of paragraph twentieth of the Bill to the effect that it has acquired the absolute ownership of various parcels of land necessary for the construction of its improvement. It will be noticed that this paragraph twentieth does not state when these various parcels of land were acquired by the Power Company. The Power Company made this same argument in *Sears vs. Akron* and this point was made the subject of sub-division (3) of the opinion, which decided that nothing in this respect set forth in the Bill could relieve the plaintiff Power Company of the charge that its alleged rights "are not such as to entitle him (*Sears*) to relief in equity."

For the reasons set forth above, the decree of the District Court sustaining the motion to dismiss must be affirmed.

VI. THE FEDERAL COURTS HAVE NO JURISDICTION TO ENTERTAIN PLAINTIFF'S CASE.

All of the parties, both plaintiff and defendants, are citizens of the State of Ohio. The jurisdiction of the Federal courts depends solely upon the point whether a Federal question is presented. The plaintiff Power Company complains that its alleged contract is being impaired in violation of the contract impairment clause of the Federal Constitution, and also that it is being deprived of its property without due process in violation of the due process clause of the Fourteenth Amendment. In *Sears vs. Akron* this Court held that the plaintiff Power Company has no contract to be impaired. In view of that decision the contract impairment clause is not involved and the jurisdiction of the Federal courts must be sustained, if at all, upon the charge that the plaintiff is being deprived of its property without due process. The Bill alleges that the complainant Power Company has certain rights and certain property, but it fails to show any interference by the defendants with any of such rights and property. If the plaintiff Power Company has the right to proceed with the development of its plant, nothing that the defendants are alleged to have done, or to be threatening to do, will or can interfere with plaintiff's progress to accomplish that result.

In *Underground Railroad vs. City of New York*, 193 U. S. 416, the plaintiff asked for an injunction to restrain the city of New York from constructing an underground railway, alleging that it had acquired certain rights to construct a similar road upon the same location under its charter and the filing of its plan. They relied upon the contract impairment clause and the due process clause. The Bill was dismissed for want of jurisdiction. This Court said (page 422):—

"If, on the face of complainants' statement of their own case, it does not appear that the suit really and substantially involved a dispute or controversy as to the effect or construction of the Constitution, on the

determination of which the result depended, the Circuit Court was right and its decree must be affirmed. *Defiance Water Co. vs. Defiance*, 191 U. S. 184."

This Court further said (page 430) :—

"The result is that it appeared on the record that complainants possessed no contract rights which were impaired, or of which they were deprived and that the suit did not really and substantially involve a dispute or controversy as to the application or construction of the Constitution."

In *Ramapo Water Company vs. New York*, 236 U. S. 578, the plaintiff water company undertook to enjoin the city from proceeding with the construction of water works. The plaintiff relied upon the contract impairment clause and the due process clause. The Bill was dismissed for lack of jurisdiction. This Court said (page 583) :—

"The District Court, being of opinion that the bill disclosed no such rights as the plaintiff claimed and therefore showed no real constitutional ground, dismissed the bill. The plaintiff's argument, while admitting that it must appear that there is a substantial question under the Constitution and that the formal averment of such a question is not enough, makes a rather useless attack upon the application of that principle in *Underground R. Co. vs. New York*, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494. If it is apparent that the bill is groundless, it does not matter very much whether the dismissal purports to be for want of jurisdiction or on the merits. But we are of opinion that the groundlessness of the bill is so obvious that it fairly may be said that no substantial constitutional question appears."

In this case the Ramapo Water Company undertook to cover, with a scheme as pretentious and extravagant as

the scheme of the Cuyahoga River Power Company in the present case; a very large territory, and contended that by adopting a plan under its charter and filing a map it had acquired prior rights upon this most extensive territory. On this point this Court said (page 584):—

“The direction to file a map of the route adopted and the land to be taken, coupled with the other provisions that we have recited, appears to us to have in view the route and the land needed for the route, and only that, not the thousand square miles that the plaintiff claims.”

And again (page 585):—

“But, as we have said, nothing short of a specific decision of the Court of Appeals would make us believe that the Act of 1895, gave to the plaintiff, without notice to land owners or other preliminary, a vested right, seemingly unlimited in time, to exclude the rest of the world from whatever watersheds it chose, simply by filing a map.”

These last two quotations are particularly pertinent when considering the claim of the plaintiff Power Company in the present case. This Ramapo case and also the Underground Railway case are express authorities in favor of the proposition that the Federal Courts have no jurisdiction to entertain plaintiff Power Company's case which, just as was true in the two cases named, does not present any substantial question arising under the Constitution.

In view of the above authorities this case should be dismissed for want of jurisdiction but, as suggested in one of the above quotations from the Ramapo Water case, it does not matter very much whether the dismissal purports to be for want of jurisdiction or on the merits, including, we might add, that the plaintiff's Bill fails to disclose any basis for equitable relief.

VII. RELIEF PRAYED FOR.

The absence of basis for plaintiff Power Company's claim to relief in equity is more than offset by the searching relief prayed for (see Transcript of Record, page 14). The Bill asks that the defendants be enjoined from using the several parcels of land or the structures erected thereon or the waters of the river for the purpose of developing, generating or producing light, heat or power; from asserting or claiming that their use of these parcels and structures and waters is a public use; from interfering with plaintiff's exercise of its rights and privileges, including its right to acquire "by the exercise of the power of eminent domain" the title and ownership of the lands and from erecting additional structures or improvements upon these properties; that defendants be required and compelled to remove such structures and devices, already erected on these lands, or to grant and convey them to the plaintiff and that a Receiver be appointed to take possession of these structures and devices and, as incidental, that the plaintiff pay damages occasioned to it by the defendant's violations and takings of right of way, property, &c. The slimness of plaintiff's rights compares unfavorably with the fullness of plaintiff's claims.

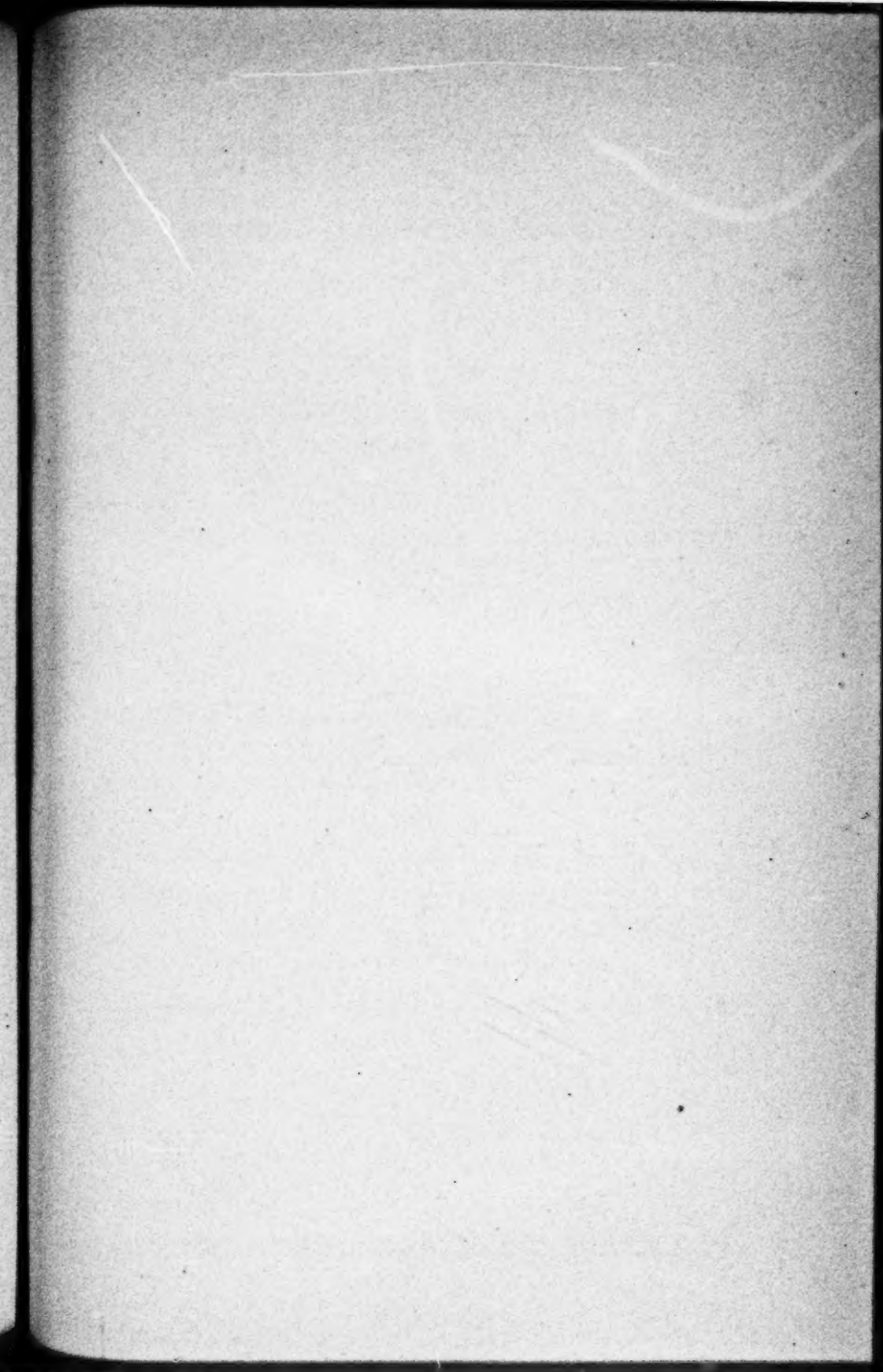
VIII CONCLUSIONS.

The sole basis for plaintiff's claim is its alleged contract and property rights based upon its charter and the adoption of its plan. It asserts that by the adoption of its plan it acquired a prior location and the right to appropriate all lands necessary for the consummation of its scheme. We deny that under the law of Ohio the adoption of the plan gave the plaintiff Power Company any such prior right. In order, however, to meet plaintiff's position we assumed for the purposes of the argument that the adoption of this plan would, under ordinary circumstances, give it an alleged prior right and enumerated seven different reasons (*supra*, pages 15 to 17 inclusive) why, even on that hypothesis, plain-

tiff Power Company is not entitled to relief in equity. We have also shown that no substantial federal question is involved and on that account the federal courts have no jurisdiction.

We respectfully submit that the decree of the District Court sustaining the motion to dismiss must be affirmed.

JOSEPH S. CLARK,
Of Counsel for Appellees.





IN THE UNITED STATES DISTRICT COURT.

Northern District of Ohio, Eastern Division.

No. 310.

JOHN H. SEARS, AS TRUSTEE,
Plaintiff,

vs.

THE CITY OF AKRON,
Defendant.

MEMORANDUM OPINION.

CLARKE, District Judge:

This cause came on for hearing upon motion to dismiss the bill of complaint and was submitted to the court on briefs.

Stated in very general terms the claim of the bill is that the plaintiff is a trustee for the bond-holders under a mortgage claimed to have been issued by the Cuyahoga River Power Company dated July 13th and acknowledged on July 15, 1915.

The plaintiff claims that the Power company "by appropriate corporate resolution" on June 8, 1908, adopted a plan called the "plan of the Roberts Abbott Company," which definitely located on designated lands proposed improvements for the generating and transporting of electricity, including a large dam and various reservoirs, which action the bill claims "appropriated" to the use of the company, the water of the Cuyahoga River and apparently its adjacent banks for many miles.

Later, on April 23, 1909, the company adopted an amended plan of procedure called the "Von Schon Plan," covering with its blanket scheme a much greater extent of territory.

The purposes of the Power Company as stated in the twelfth paragraph of the bill are sweeping in character involving the construction of a series of dams in the Cuyahoga River, Tuscarawas River, Mud Brook, Brandywine and Tinkers Creeks and tributaries of each of these, being situated in Cuyahoga, Medina, Summit, Portage, Stark, Geauga, Tuscarawas and adjacent counties in the State of Ohio, and it is added that the purpose is to construct and maintain canals, locks and raceways to regulate and carry the head of water which it is proposed to obtain from the various designated streams to power houses and thence to distribute to consumers the electricity which it is proposed to generate.

It is stated that the character of the improvements proposed is such that they are not to be located at any single place, and therefore the eastern terminus of the projected plan is designated to be at or near the village of Burton Station in Geauga County, and its southern terminus at or near Canal Dover in Tuscarawas County. It may be noted that this scheme covers the water and water sheds of what must largely exceed 100 miles of the rivers and streams of northeastern Ohio.

The bill alleges diligent conduct on the part of the Power company during the years between its organization on May 28, 1908, and the filing of the bill in this case on July 24, 1915, but its chief industry, as the court gathers it from the bill, appears to have been making surveys and making claims against the city of Akron for invasion of what it claimed to be its rights, until the execu-

tion of the mortgage dated July 13-15, 1915, under authority of which the plaintiff sues.

It is alleged that on May 7, 1912, the Power Company duly located and adopted by corporate resolution specific surveys and described each parcel of land necessary in the execution of its plan and the claim is added that by the corporate action thus taken adopting specific surveys and descriptions of the lands required for carrying out its projects, the Power Company acquired and became possessed of a valid right and franchise to construct and maintain upon the lands and waters embraced within the descriptions so adopted as aforesaid, the reservoirs, dams, power houses and other appurtenances requisite for the development of hydro-electric power in accordance with the plans adopted by it, and to acquire and utilize said parcels of land for the accomplishment of its objects and purposes and from and after the time of the adoption by said company of said descriptions of said parcels of land, it is claimed the lands and waters embraced within said descriptions were and ever since have been and now are legally and equitably subject to said company's franchise.

Thus the claim of the plaintiff is that by this entirely private corporate action of the Power Company and without any payment to or even notice to the owners of the land over which it resolved to operate, it acquired an equitable right to use the parcels of land designated in its private records as necessary for its purposes, which right it now prays this Court to protect against invasion threatened by the city of Akron, under the circumstances stated in the bill, which will be stated later on in this opinion.

It should be added that the bill shows that the Power Company claims to have acquired during the years

between 1908 and 1915 a small piece of property—approximately a quarter of an acre of land—and a more or less indefinite right to a short stretch of the bed of the Cuyahoga River and indefinitely described options upon other indefinitely described properties.

The plaintiff sues as trustee for the bond-holders under the mortgage referred to dated July 13-15, 1915, to secure bonds of the aggregate face value of \$150,000, which bonds the mortgage, made a part of the bill, declares were issued to pay for money borrowed and services contracted for in the month of April, 1909. By this mortgage, title was conveyed to the trustee in all of the lands which the Company claims to own, and in certain options which it claims to have acquired.

The action of the city of Akron of which complaint is made is that beginning with the securing of the passing of a bill by the Ohio General Assembly on May 17, 1911, that city by various proceedings of its council and officials acquired territory and constructed an extensive dam or reservoir to supply its inhabitants with water from the Cuyahoga River.

The bill was filed on July 24, 1915, and it is alleged that the defendant had announced its intention of diverting the waters of the Cuyahoga River to the use of its inhabitants on the first day of August, 1915, in violation of the rights, property and franchises of the Power Company.

There is no allegation that any part of the land which the Power Company owns is actually invaded by any of the constructions of the defendant, and the real substance of the complaint is that the Power Company's project of utilizing the waters of the Cuyahoga River and many other streams for many miles will be impaired by the city's use of the water of the river as threatened.

In addition to all this, it is alleged that the city of Akron is without funds and is financially unable to pay any damages which may be caused to the Power Company, if it is not restrained from the use of the dams and reservoirs which it has constructed, and that all that the city has done in providing for the use of the waters of the Cuyahoga River has been done in bad faith and fraudulently for the benefit of certain individuals and private corporations, and not for the benefit of its inhabitants generally.

These allegations with respect to the insolvency of the city of Akron and the fraudulent conduct of its officers are mere conclusions of the pleader without any facts being stated to support them, and therefore, though this motion to dismiss admits as true all allegations which are well pleaded, they can serve no useful purpose in making the case one in equity if without them it would be one at law for damages. Even if the law on this point were different from what I have stated it to be, this Court would refuse in obedience to any technical rule to accept as true any such allegations. The city of Akron is not insolvent, but is abundantly able to pay, and in the judgment of this Court desires to pay any claims which it may justly owe, and it is impossible to believe that the many public officials who must have participated in the construction of the great public work under consideration in this case can have been false to the trust imposed in them for many years by the community in which they lived.

Under the state of facts thus alleged in the bill, this Court is clearly of the opinion that the Power Company, by the mere adoption of its Board of Directors of a plan of its proposed improvement, did not acquire as against the city of Akron any interest whatever, legal or equit-

able in the lands and waters used or intended to be used by it in providing a water supply system for its inhabitants.

In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken, or payment made does not give to the plaintiff any title or right whatever legal or equitable in the lands embraced within such paper scheme. This is distinctly the settled law of Ohio, and the best expression of it is, I think, to be found in the case of *Columbus, etc., Co. vs. T. & O. C. Ry. Co.*, 32 W. L. B. 186. This is a Common Pleas Court decision, but it is well worked out and the absence of decision by higher courts on a question which must have frequently arisen is of itself strongly confirmatory of its authority as an expression of the accepted law of the state. The court says:

"But the grant, by articles of incorporation to a railroad company of a right to construct a road is afloat; it attaches to no specific lands until the line of the road is sufficiently fixed by purchase of the land, or by condemnation proceedings and acceptance of the land condemned. Even after the land is condemned the Railroad Company may elect not to pay the price and accept the land. The fact that a Railroad Company has surveyed and staked a line upon certain grounds does not conclude it, why then should it conclude anybody else? The company may survey and stake more than one line and by comparing the cost and advantages of each of them, determine upon which it will build, but the line is not definitely established until the land is condemned, paid for or accepted, or purchased by agreement."

So in *State of Ohio ex rel. vs. Cincinnati*, 17 O. S., 103, the court states what is well known to this Court to be the opinion of the profession of the state that

“no appropriation of the lands of the relators could be completed, no title from them could be acquired and no incumbrance could be imposed on their estate by the railroad company until the amount of compensation fixed by the findings of the jury was paid in money or secured to be paid, by a deposit of money.”

The plaintiff has no power of eminent domain greater or other than a railroad company has. In the State of Ohio there is not now and never has been any statute requiring a corporation desiring to exercise the right of eminent domain to file in any public office a map or survey of the route or plan of the improvement adopted by the Company, so that the rule that land owners or other corporations are in any wise estopped or their property encumbered by the mere private resolution of a company possessing the power of eminent domain has never prevailed in this state as it has in some other states. Grave constitutional questions are argued in the briefs filed in support of this bill to the effect that the use of land by the city of Akron and of the water supply of the Cuyahoga River, which the plaintiff claims it appropriated to itself by adopting upon paper its grandiose scheme, offend against the constitution of the State of Ohio and of the United States by the taking of the plaintiff's property without due process of law.

The sufficient answer to these claims is to be found in the decision of the Supreme Court of the United States in *Ramapo Water Company vs. The City of New York*, 236 U. S., 579, in which the court, passing upon a case strikingly similar in many respects to the one at bar says:

"The District court, being of opinion that the bill disclosed no such rights as the plaintiff claimed, and therefore showed no real constitutional ground, dismissed the bill. The plaintiff's argument, while admitting that it must appear that there is a substantial question under the Constitution, and that the formal averment of such a question is not enough, makes a rather useless attack upon the application of that principle in *Underground Railroad vs. New York*, 193 U. S., 416. If it is apparent that the bill is groundless, it does not matter very much whether the dismissal purports to be for want of jurisdiction, or on the merits. But we are of opinion that the groundlessness of the bill is so obvious that it fairly may be said that no substantial constitutional question appears."

Since the bill in this case does not show any substantial property, legal or equitable in the plaintiff which is invaded by the defendant, it is obvious that it is not important to consider constitutional questions which it is claimed are involved in the case.

It is perhaps not improper to note that the counsel for the appellant in the case last cited appears as the solicitor for the plaintiff in this case and files an elaborate brief in support of substantially the doctrine which was rejected with such emphasis by the Supreme Court in that case.

What we have said sustains the motion to dismiss the bill, but another view of the case presses insistently upon the attention of the court. The bill was filed on the 24th day of July, 1915, and it is alleged therein that the city of Akron was threatening to divert the waters of the Cuyahoga River to its use on the first day of August, 1915. It also appears from the bill that the capacity of the water works which the city had constructed was 194,000,000 gallons a day. If the court had no other knowl-

edge than these allegations, it would be plain that the city of Akron has been for many years engaged in the construction of this water supply system and that it must have cost many millions of dollars.

It is alleged in the bill that the company for which the plaintiff is trustee on July 14, 1915, filed a bill in this Court praying for an injunction on substantially the same grounds as those stated in this cause which bill was dismissed for want of jurisdiction, and that an appeal from that decision is now pending in the Supreme Court of the United States, and it is also alleged that various futile attempts to compromise with the city of Akron were made by the plaintiff. The mortgage under which the plaintiff was trustee is by reference made a part of the bill, and it recites that it was given to secure the payment of money borrowed and services contracted for in the month of April, 1909. Persons so interested in the affairs of the Power Company as such creditors must have been, must have known of the prior attempt in this Court to enjoin the city of Akron from going forward with its water supply construction, and must have known also that the city was expending large sums of money in providing for that water supply. The trustee whose rights cannot rise higher than those of the creditors he represents, did not begin this suit, until as we have said, within six days of the time when the city had announced that it was about to make use of the completed construction which must have cost a very large sum of money.

These facts must be taken into consideration when a chancellor is asked to enjoin a great public improvement, and by his order inconvenience the inhabitants of a city with approximately 100,000 inhabitants.

Such a state of facts makes sharply applicable the decision of the Supreme Court of United States in New

York City vs. Pine, 185 U. S., 93, a case with many features not greatly different from the one at bar. Here the plaintiff sought to enjoin the city of New-York from the use of the water of a river after it had expended a large sum of money in providing for use of such water. The court discussing elaborately the law applicable to such a state of facts, says:

"The time at which parties invoke the aid of a court of equity is often a significant factor in determining the extent of their rights. *Vigilantibus non dormientibus aequitas subvenit* is a maxim of equity." (p. 98) * * *. The court quotes with approval from *Smith vs. Clay*, 3 Brown Ch., 639, as follows:

" 'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence.' "

The review of many cases is concluded as follows, viz:

"From these authorities it is apparent that the time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. If one, aware of the situation, believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights, but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted for the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to

enforce those rights, and in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal."

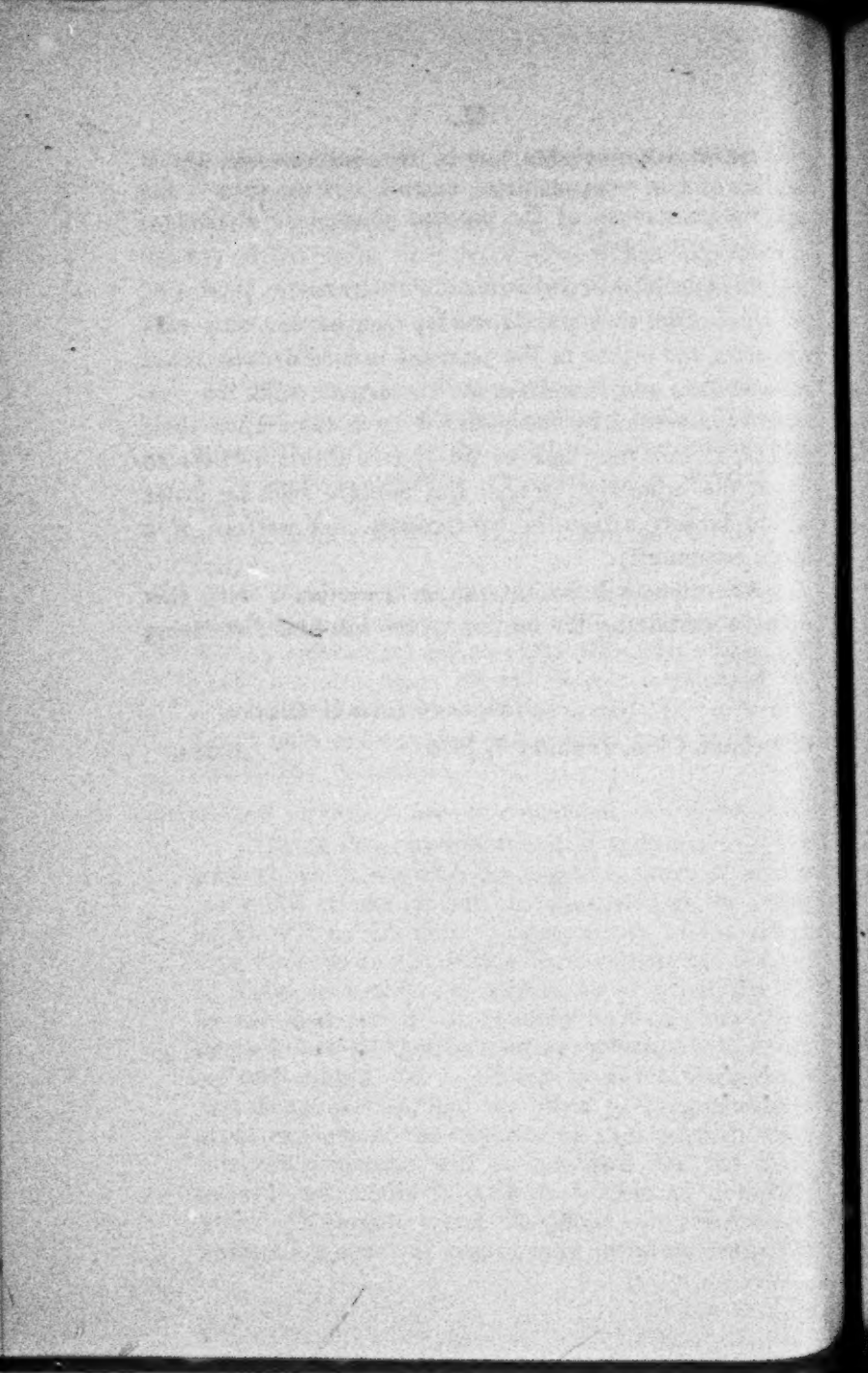
It is decided in *Sullivan vs. Portland, etc., R. R. Co.*, 94 U. S., 806, that a court of its own motion may take notice of the laches of the plaintiff and refuse the relief prayed for, and therefore for the reason that the persons represented by the plaintiff have slept upon their rights, if any they had or have, this Court refuses to grant the injunction prayed for, because such an order would largely affect the convenience and welfare of a large community.

An order will be entered in accordance with this opinion sustaining the motion to the bill and dismissing the suit.

(Signed) John H. Clarke,

Cleveland, Ohio, January 7, 1916.

Judge.



IN THE UNITED STATES DISTRICT COURT.**Northern District of Ohio, Eastern Division.****In Equity. No. 344.**

**JOHN H. SEARS, AS TRUSTEE,
Plaintiff,**

VS.

**THE NORTHERN OHIO TRACTION & LIGHT COMPANY AND
THE NORTHERN OHIO POWER COMPANY,
Defendants.**

OPINION.

CLARKE, District Judge:

This cause came on to be heard upon the motion of the defendant that it be dismissed upon two grounds, first, because the bill does not state a cause of action within the equity jurisdiction of this Court; and second, because the alleged property rights and interests of the plaintiff have been adjudicated or are now pending for final adjudication in the Supreme Court of the United States.

The plaintiff sues as trustee under a mortgage executed to him as grantee of "The Cuyahoga River Power Company" dated the 13th day of July, 1915, but acknowledged on the 15th day of July, 1915. (Hereinafter the grantor will be referred to as "The Power Company.") By this mortgage, in order to secure an issue of \$150,000 in bonds, the Power Company conveyed to the plaintiff as trustee, various parcels of property therein described and options upon others, and also the right

or franchise of the Power Company to appropriate and use certain of the waters of the Cuyahoga River and the lands to which the same are appurtenant.

It is alleged that \$125,000 of these bonds have been issued and are owned by bona fide holders for value, but there is no allegation in the bill that the Power Company has defaulted in payment of either the interest or principal of the bonds. The claim in general which is made the basis of the suit is that the defendants have taken such action with respect to three parcels of land, two of which are in the bed of the Cuyahoga River and are covered by its waters, and one a small parcel immediately adjacent to the river, that unless the defendants are restrained from further use of them, the corporate purpose of the Power Company will be impossible of accomplishment, and thereby the security which the plaintiff holds by the virtue of the mortgage referred to will fail and be of no value.

It is alleged that the defendant, the Northern Ohio Power Company between January 31, 1911, and February 24, 1914, a year and a half, be it noted, before the date of the plaintiff's mortgage, constructed upon the three parcels of land described in the petition, a power house with boilers and other machinery necessary for the generation of electricity, and also constructed a dam in the Cuyahoga River from which power is derived for the operation of the plant, and that this plant has been in use by the defendant, the Northern Ohio Traction and Light Company for the generation of the electrical power with which it operates various lines of interurban and street railway since February, 1914.

It is also alleged that the defendant, The City of Akron, has acquired from The Northern Ohio Traction

and Light Company all rights which it had to use the waters of the Cuyahoga River, and it must be inferred that it is supplying such water to the inhabitants of that city.

The prayer of the bill is that the defendants be enjoined from the use of the power plant, which upon the face of the bill appears to have been completed a year and six months almost before the mortgage to the plaintiff was executed; and that the defendant, The City of Akron, be enjoined from the use of and be required to remove any structures which have been erected upon the land described in the bill, and which may interfere with the possession and use by the Power Company of the lands described for the accomplishment of its corporate purposes.

It is to be noted that there is no allegation that either of the defendants is insolvent, and there obviously is no reason why the plaintiff, the trustee of the mortgage cannot be fully compensated by a money judgment for any damage which he as trustee can suffer.

The plaintiff states in great detail that the Power Company was incorporated on May 29, 1908; that on June 4, 1908, it adopted a detailed plan for the development of electric power by use of the waters of the Cuyahoga River, which resolution is attached to the bill as an exhibit, and is made a part of it. While other parcels of land are described in the bill, the plaintiff alleges that three parcels—one known as the Everett, one as the Sackett and the one as the A. B. and C. parcel are indispensably necessary to the accomplishment of the purposes of the Power Company, and it says that on June 5, 1908, the Power Company instituted proceedings in the Probate Court of Summit County, Ohio, to appropriate these three parcels of land to its use, and that this

suit was continually pending until subsequent to the 20th of January, 1911.

It is alleged that on the 20th day of December, 1910, while this suit was pending against Henry A. Everett, said Everett executed the deed for what is designated as the Everett parcel of land, to the Northern Ohio Realty Company, and that on January 20, 1911, the Power Company instituted a second appropriation proceeding in the Probate Court of Summit County to appropriate the Everett parcel and the A. B. and C. parcel of land. In this proceeding the Northern Ohio Realty Company was the sole defendant. It is alleged that this case is now pending in the Supreme Court of the United States undetermined.

It is further alleged that on January 21, 1911, while said appropriation proceeding was pending The Realty Company conveyed the Everett parcel to the defendant, The Northern Ohio Power Company; that on July 18, 1911, The Northern Ohio Power Company purchased the Sackett parcel, and that on February 24, 1914, this Power Company conveyed all of its property to the defendant Traction Company, which thereupon took possession of and now holds possession of all three parcels of land and the improvements erected thereon.

It is alleged that on January 20, 1911, which is the date of the conveyance by the Realty Company to The Northern Ohio Power Company there were no constructions or improvements of any kind upon either of the three parcels of land, but that between the 20th of January, 1911, and the 24th of February, 1914, a dam which must be very extensive in character and a power house for the generation of electricity, which is described as occupying a space of 150 by 330 feet, with a maximum capacity of 83,000 horse power, were erected upon the

Everett, Sackett and A. B. and C. parcels of land, and that this power plant has been used since February, 1914, as the source of power with which the defendant Traction and Light Company operates various interurban and street railways.

It is alleged that the Traction and Light Company intends to continue the use of the power house which it was using at the time the bill was filed, and that it has not paid or offered to pay to the Power Company, the mortgagor, anything in compensation for the rights which it claims it has in the three parcels of land described.

The plaintiff alleges that the Power Company has been actively and diligently engaged in the prosecution of its corporate business, and in proceeding to carry out its corporate purposes since 1908, and that it has acquired various parcels of land and has options upon others, but avers that the reasons why it has not acquired all that land and water rights necessary to enable it

“to commence and complete the physical construction of its plant are that it has been prevented by the illegal interference of the defendants, and the immense amount of litigation in which it has become involved, which litigation and interference have made it impracticable for said Power Company to proceed.”

In an amendment to the bill, filed March 31, 1916, making the City of Akron a party to this cause, it is alleged that on the 16th day of June, 1914, the defendant Traction Company executed and delivered a deed to the City of Akron in which it is recited that the Traction Company is the owner of various parcels of land, including the Everett, Sackett and A. B. and C. parcels and

waters appurtenant thereto, and that for the purpose of supplying the City of Akron and inhabitants thereof with water that city had declared its intention to take and appropriate all of the waters of Cuyahoga River at and above a designated line, and it is alleged that in consideration of the sum of \$348,000 paid by the City of Akron, the Traction Company conveyed to it all of its water rights and privileges and "all other rights and assessments in or to said waters or to the use thereof which are or could be taken, interfered with or destroyed by the proposed taking and diverting of the water of said river by said City of Akron," but in said deed The Traction Company reserves the right to use such waters of the river as may not be taken or used by the city of Akron.

It is alleged that at the time the city of Akron made this purchase, it had full knowledge of the existence of the Power Company, and that it had made locations of a proposed plant upon the Everett, Sackett and A. B. and C. parcels and had determined to acquire them and the waters appurtenant thereto for the operation of its proposed plant.

In another suit commenced by the plaintiff in this Court on the 24th day of July, 1915, but against the city of Akron only, substantially the same facts as in this case, together with many others, are alleged in the bill. The chief difference between the two bills which this Court discovers is that in the present bill it is more distinctly asserted than in the former one, that the three parcels of land known as the Everett, Sackett and A. B. and C. parcels are occupied by the defendant Traction Company, and that they are essential to the accomplishment of the corporate purpose of the Power Company

than this is alleged in the former bill; but in substance the allegations of the former bill and those of the present one are the same, viz., that the action taken by the city of Akron alone in the former bill and in this bill by the city of Akron and the Traction Company have rendered impossible the accomplishment of the corporate purpose of the Power Company, and the prayer in the two cases is almost precisely the same, indeed in the present case the prayer is very certainly copied with slight variations from the one in the former case, so slight that in this second case the plaintiff prays "that the various acts, statutes and laws complained of as violating the Power Company's rights," etc., be declared unconstitutional and void, when no such acts, statutes and laws are referred to in the bill, although there were several such referred to in the former bill.

On July 14, 1913, the Power Company filed in this Court a bill making the city of Akron, Ohio, defendant, and on February 14, 1914, an amended bill was filed in which in substance the same claim is made as is made in this case, viz., that the city of Akron has entered upon and claims the exclusive right to use the lands described in the bill in this case we are considering and other lands alleged to be necessary to the accomplishment of the corporate ends of the plaintiff, and also to take and use the waters of the Cuyahoga River appurtenant thereto. This case was dismissed by this Court for want of jurisdiction, but that decision was reversed by the Supreme Court of the United States and the case is now pending in this Court and can be set down for early trial.

The prayer in this case is for an injunction restraining the city of Akron from constructing a dam, (which is now completed) in the Cuyahoga River, as it was then

purposing to do and from appropriating the waters of the Cuyahoga River for the use of its inhabitants.

It is apparent that the trial of this case would so determine the essential rights of the Power Company in the subject matter of the bill in the case we are considering as to in effect determine any rights which the plaintiff could possibly have as trustee under a mortgage given by the Power Company and dated so late as July, 1915.

Again it is alleged, as we have said, in the bill we are considering, that on January 20, 1911, a suit was commenced against the Northern Ohio Realty Company, the grantor of the defendant, Northern Ohio Power Company, to appropriate to the uses of the grantor of the plaintiff, the Everett and A. B. and C. parcels of property described in the bill, which suit "is now pending in the Supreme Court of the United States undetermined." It is also alleged in the bill that a similar suit to appropriate the Sackett parcel to the use of the Cuyahoga River Power Company, grantor of the plaintiff, was commenced in the year 1908, and was continuously pending until subsequent to January 20, 1911, but whether it has been finally decided does not appear in the bill.

It seems clear enough that if these two appropriation suits are decided in favor of the grantor of the plaintiff in this case, and if that grantor pays the amount of the judgments which may be rendered in them in favor of the owners of the property, the right of the plaintiff in the three parcels of land described in the bill we are considering would be fully determined, and the plaintiff's grantor would be put in possession of said lands by any court rendering such judgment, and thereby the plaintiff would be made secure in all of the rights which he is claiming in the case we are considering.

Yet again in the case hereinbefore in this opinion referred to as commenced by the plaintiff on January 24, 1915, this Court entered a decree dismissing the bill for the reason among others that it did not state a cause of action against the defendant, the city of Akron. From this decision an appeal has been taken to the Supreme Court of the United States. A motion by the defendant to advance that case for hearing has been denied, and it is still pending for disposition in that court. It seems clear to this Court that the decision of that case by the Supreme Court will so determine the issues involved in this later case as to certainly settle all the rights of the plaintiff without further trial.

Thus from the allegations of the bill in this case, and from the records of this Court it appears that there are now pending three (possibly four) suits, in addition to this one, of such character that if the plaintiff prevails in any one of them all of the rights asserted by the plaintiff in this case will be established.

If the appropriation case, if there is but one, or cases if there are two, are such as the plaintiff alleges that they are, the decision of them will determine the rights of the plaintiff grantor in the premises described in the bill in this case, and the rights of the plaintiff cannot be higher or other than the rights of the grantor, since the mortgage under which he claims was executed long subsequent to the commencement of these cases, and long after everything complained of by the plaintiff was done by the defendants.

Old Colony Trust Co. vs. Omaha, 230 U. S., 100.

Keokuk & Western R. R. vs. Missouri, 152 U. S.,

Over such a statutory remedy at law seemingly adequate for the protection of every right the plaintiff may have, a court of equity cannot take jurisdiction of the case. Convinced also as I am that the case now pending in the Supreme Court of the United States in which the plaintiff in this case is the plaintiff involves every question which is involved in this case, I conclude that the plaintiff is clearly bound by that decision and that he cannot be permitted to relitigate the same questions in this case.

The case reversed by the Supreme Court and now pending in this Court for trial clearly involves the rights of the plaintiff's grantor *ca.* which the plaintiff in this case must rely, and since his rights as trustee of the mortgage were acquired long subsequent to the commencement of that suit, a decision of it must conclude the plaintiff in this case, and for this reason also the plaintiff should not be permitted to again relitigate the same question.

In addition to all this it seems very clear that the claim of the plaintiff in this case, mere trustee as he is under a mortgage, is plainly one which can be fully compensated in money, and since there is no allegation that any of the defendants are insolvent, it would seem that if the plaintiff really has any such rights in the premises described in the bill as he claims that he has, there is no reason why a suit at law for damages against the defendants would not be an adequate, complete and perfect remedy for the plaintiff, and for this reason also, if there were no other, the motion to dismiss the bill must be sustained. Judicial Code, Sec. 267.

The conclusion which we have reached also calls for the dismissal of the bill upon the second ground of the

motion filed, viz., because the alleged property rights of the plaintiff have been adjudicated in the case which is now pending for review in the Supreme Court of the United States. It is difficult, as we have said, to discover any substantial difference in the claims asserted in the bill filed in this case from those asserted in the case commenced in this Court by this same plaintiff in July, 1915, which is now pending in the Supreme Court of the United States, and there can be no doubt that the disposition of that case will dispose of this one. For this reason also the motion of the defendant to dismiss the bill will be sustained.

A decree will be entered in conformity with the conclusions of this opinion.

JOHN H. CLARKE,
Judge.

Cleveland, Ohio, May 25, 1916.

its plant, along a certain river, between the termini designated in its articles, with the power of eminent domain to acquire title from private owners; that these rights were crystallized by a resolution of its board of directors adopting a detailed plan of power development and definitely and irrevocably fixing the location of its proposed works on specific lands, surveyed by its engineers and essential to the enterprise; that all this, supplemented by condemnation proceedings initiated but not as yet consummated, gave exclusive rights to acquire the lands for plaintiff's corporate objects, through its power of eminent domain; and that the purchase of such lands from their owner by one of two defendant public service corporations, also organized under general laws of Ohio, their transfer to the other, with the consent of the state Public Utilities Commission, and their occupation and use by the other for generating electric power, with assertion of immunity from plaintiff's power of condemnation, worked an impairment of plaintiff's contract, and a taking of its property, by state action or agency. *Held*, that the asserted federal questions were too plainly without merit to afford jurisdiction to the District Court. P. 395. *Sears v. City of Akron*, 246 U. S. 242. Affirmed.

THE appeal is direct to this court, the laws and Constitution of the United States being asserted to be involved. Upon motion of defendants (appellees) the bill was dismissed for want of jurisdiction and equity. Its allegations, therefore, become necessary to consider.

Plaintiff (appellant) was incorporated as a hydro-electric power company on May 29, 1908, for the purposes specified in the act of the legislature of Ohio, passed in 1904, and contained in §§ 10,128 and 10,134 of the Ohio General Code of 1910.

The Articles of Incorporation filed May 29, 1908, with the Secretary of State specified the streams across which the dams were to be built and maintained, that is, the streams in controversy, the Big Cuyahoga River and certain of its tributaries.

By said incorporation a contract was duly made and entered into between the State and plaintiff whereby the State granted to plaintiff a right of way over and along the

Cuyahoga River between the designated termini and a vested right and franchise to construct, maintain and operate, within the limits of the right of way, a hydro-electric plant for the development of electric current and energy from the waters of the river, together with a right or franchise to exercise the State's power of eminent domain in order to appropriate and acquire property necessary to carry out and perform the grant and make it effective. The grant has not been repealed.

The grants were accepted and are of great value and upon the faith of that, the capital stock of plaintiff was subscribed for, and large expenditures and investments made and obligations incurred, including bonds of the par value of \$150,000, and stock to the value of \$210,000, all in a large part prior to December, 1910.

On June 4, 1908, plaintiff by its board of directors adopted a specific and detailed plan for the development of the power and sale of the same to the public, and definitely located its proposed improvements for that purpose upon specifically described lands, which had previously been entered upon and surveyed by its engineers, and then and there declared and resolved that the parcels of land were necessary to carry out the purpose of the plaintiff's organization and that it thereby appropriated and demanded them for its corporate purposes. The parcels of land described in the resolution include all that were necessary for the purpose of the corporation, and the location of the improvement so fixed by the resolution was permanent and irrevocable and conclusive upon plaintiff and all other persons except as the same might be altered by further act of the State.

June 5, 1908, the plaintiff instituted a suit in the court of proper jurisdiction, to condemn or appropriate in accordance with the statutes of Ohio, the parcels of land mentioned in the resolution, and the persons owning the same were made parties. The suit was continuously pend-

ing until a date subsequent to July 18, 1911, but at the instance and request of one of the owners of the parcels, and of the Northern Ohio Traction and Light Company, called the Traction Company, the suit was not pressed for trial against them until January, 1911, up to which date certain negotiations in regard to the improvement of the Company were proposed, but finally terminated in the refusal of the owner of the land and the Traction Company to sell the land to plaintiff.

December 20, 1910, pending the suit and negotiations, the landowner executed a deed of the lands to The Northern Realty Company, conveying to it a fee simple title.

January 20, 1911, after unsuccessful negotiations with the Realty Company, plaintiff instituted another suit for the condemnation of the land, which suit was prosecuted in the Probate Court (the court of jurisdiction) and is now pending in the Supreme Court of the United States, undetermined, to which court it was carried by a writ of error from the Court of Appeals of Ohio.

January 31, 1911, and while the suit above mentioned was pending, the Realty Company conveyed the land that had been conveyed to it, to the Northern Ohio Power Company, and the latter company conveyed that and other land which it had acquired, and all of its properties, rights and franchises to the Traction Company and the latter company entered upon the lands and now holds possession of them and of the improvements erected thereon.

Prior to January 20, 1911, no location or improvement upon the lands above designated was made for the purpose of utilizing them in the development of power and they were actually employed for no use whatsoever, except a small wooden structure intended and occasionally used for dances and roller skating, a small portion of which structure was within all of the parcels.

Between January 31, 1911, and February 24, 1914, there

was erected upon the lands designated, a power-house and other appliances for the generation of electric current and energy by means of steam power, also a dam, a power-house and other appliances for the generation of electric current and energy by the flow and fall of the waters of the river.

(There is an allegation of the capacity of the plants which may be omitted. Other allegations in regard to the various companies and the powers they possess and do not possess also may be omitted. It is only necessary to say that it is alleged that the Power Company had not, and the Traction Company has not, power to use the designated lands or the waters of the river to operate the steam power plant and the hydro-electric plant, or for the development of such powers and, therefore, neither company had power to exercise eminent domain for such purposes, though asserting its right and intention to do so, and if it should do so, it would invade and injure rights of plaintiff, inflicting "upon the plaintiff and the persons interested therein a continuing, permanent and irreparable injury, for which there is no adequate remedy at law.")

From and after the time of the adoption of the resolution of June 4, 1908, the designated parcels of land were subjected to plaintiff's public use and its rights and franchises, exclusive of all other persons and corporations; that such rights and franchises were granted to plaintiff by the State of Ohio under and by authority of plaintiff's contract with the State, and for the protection of which plaintiff is entitled to and claims the protection of the Constitution of the United States and of the Amendments thereof, as well as § 5 of Article XIII of the constitution of the State of Ohio.

The effect and result of the Traction Company's use of the designated parcels of land and of the waters of the river is an appropriation by it of the rights and franchises of plaintiff and the deprivation of its property for private

use without compensation and without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and an impairment of the contract of plaintiff with the State of Ohio within the meaning of Article I of the Constitution of the United States.

Plaintiff has at all times and since its incorporation, actively and diligently and in good faith proceeded to carry out and accomplish its corporate purpose.

In April, 1909, the plaintiff amended its resolution of June 4, 1908, and enlarged its proposed plant and the output and product thereof and obtained a grant from the State over the additional portion or section of the Cuyahoga River so as to carry out the amended plan, and ²² provides for the utilization of the designated parcels of land necessary to the plaintiff's rights and franchises. (The additional capacity is alleged.)

The prayer is that plaintiff's rights and franchises be established and adjudged; that the proceedings complained of be decreed a violation of the plaintiff's rights, and of the constitution of Ohio and the Constitution of the United States, and a taking its property without due process of law. And that an injunction be granted against their further exercise; that defendants be required to remove the structures and devices already erected upon the lands, or to convey them to the plaintiff, and that a receiver be appointed to take possession of the lands and structures. An accounting is also prayed, and general relief.

Mr. Carroll G. Walter, with whom *Mr. William Z. Davis* and *Mr. John L. Wells* were on the briefs, for appellant.

Mr. John E. Morley and *Mr. J. S. Clark*, with whom *Mr. S. H. Tolles* and *Mr. T. H. Hogsett* were on the briefs, for appellees.

**CUYAHOGA RIVER POWER COMPANY v. NORTH-
ERN OHIO TRACTION & LIGHT COMPANY
ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO.**

No. 102. Argued March 17, 1920.—Decided April 19, 1920.

Plaintiff, a hydro-electric company organised under a general law of Ohio, averred in its bill to quiet title, that its incorporation constituted a contract whereby the State granted it a right of way for

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

As we have said, a motion was made to dismiss the bill. The grounds of the motion were that there was no jurisdiction in the court, the controversy not arising under the Constitution and laws of the United States, and that the bill did not state facts sufficient to constitute a cause of action against defendants or either of them.

There is an assertion, in words, of rights under the Constitution of the United States, and the only question now presented is whether the assertion is justified by the allegations of the bill. Putting the question concretely, or rather the contention which constitutes its foundation, the District Court said, "The contention of the plaintiff is that by virtue of its charter, it has appropriated the potentialities of the river and its tributaries within the boundaries by it designated in its resolution of improvement, and that it is entitled, because of its incorporation under the general laws of the State, to exclude any use of the water power of these streams of the nature of the use which it anticipates enjoying in the future while it proceeds, however dilatorily, to make its improvements in detail and to complete its ambitious scheme. In brief, its proposition is that its charter is equivalent to a contract with the State of Ohio giving it the exclusive right to the employment of the benefits which nature has conferred upon the public through the forces of these streams to the end that, until it finds itself able to completely occupy all the territory which it has privately designated to be necessary for its use, the public shall not have the advantage of any portion not immediately occupied by it through the employment of the resources thereof by another public utility company."

The court rejected the contention holding that it was not tenable under the law and constitution of Ohio. To

sustain this view the court cited prior Ohio cases, and certain cases on the docket of the court, and, as an inference from them, declared that it was "not true in Ohio that the character of complainant gave to it 'a vested right seemingly unlimited in time to exclude the rest of the world from the water sheds it chose' simply by declaring by resolution just what territory it hoped in the future to occupy to carry out its purposes" and further, "the terms of Section 19, Art. I of the Ohio constitution militate against plaintiff's claim. Until appropriation is completed as provided by the condemnation laws of the State, the Traction Company's right to dominion over its holdings is inviolate. *Wagner v. Railway Co.*, 38 O. S. 32." The court also cited *Sears v. City of Akron*, 246 U. S. 242 (then just delivered) expressing the view that if the case had been brought to the court's attention sooner, a less extended discussion of the motion to dismiss could have been made.

We concur with the District Court both in its reasoning and its deductions from the cited cases. The contention of plaintiff is certainly a bold one and seemingly erects into a legal principle, that unexecuted intention, or partly executed intention, has the same effect as executed intention, and that the declaration of an enterprise gives the same right as its consummation. Of course, there must be a first step in every project as well as a last step, and in enterprises like those we are considering there may be attainment under the local law of a right invulnerable to opposing assertion. And this plaintiff contends. To be explicit it contends that as against the Power Company and the Traction Company, they being its competitors in the same field of enterprise, its resolution of June 4, 1908, constituted an appropriation of the waters of the river, and a definite location of "its proposed improvement for that purpose upon specifically described parcels of land previously entered upon and surveyed by its engineers." Whether the

resolution had that effect under the Ohio laws we are not called upon to say. Indeed, we are not so much concerned with the contention as the ground of it. Plaintiff alleges as a ground of it, a contract with the State of Ohio, by its incorporation, "wherein and whereby said State duly granted to the plaintiff a right of way over and along said Cuyahoga River" between the designated termini, with the rights and franchises which we have mentioned, together "with the right or franchise of exercising the State's power of eminent domain in order to appropriate and acquire all property necessary to carry out and perform said grant and make the same effective" and that the acts of defendants, having legislative sanction of the State, impair plaintiff's contract.

It is manifest, therefore, that the determining and effective element of the contention is the charter of the State, and plaintiff has proceeded in confidence in it against adverse adjudications. One of the adjudications is *Scars v. City of Akron, supra*. The elemental principle urged here was urged there, that is, there was urged there as here, that the charter of the company constituted a contract with the State, and that the contract was to a conclusive effect executed by the resolution of the board of directors of plaintiff on June 4, 1903, such resolution constituting an appropriation of the lands described therein, they being necessary to be acquired in order to construct and maintain the improvement specified in the plaintiff's charter and resolution. The principle was rejected and it was decided that the incorporation of plaintiff was not a contract by the State with reference to the riparian rights, and that if plaintiff acquired riparian rights or specific rights in the use and flow of the water, that "would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter."

The case is determinative of the plaintiff's contention here, and it is manifest if plaintiff has any rights, they

are against defendants as rival companies or against them as land owners, rights under the charter, not by the charter, considered as a contract express or implied. The District Court recognized the distinction and confined its decree accordingly. The court refused to speculate as to what plaintiff might be able to do hereafter in the assertion of rights against the Traction Company, but declared that it was against public policy to accede to the contention of plaintiff that, in the absence of specific acquirement, plaintiff could prevent an owner of property within its territory from occupying or using the same, without condemnation proceedings being had and compensation paid or secured for such property.

The court, therefore, was considerate of the elements of the case and of plaintiff's rights both against defendants as rival companies or as land owners, and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a federal court unless there be involved a federal question. And a federal question not in mere form but in substance, and not in mere assertion, but in essence and effect. The federal questions urged in this case do not satisfy the requirement. The charter as a contract is the plaintiff's reliance primarily and ultimately. Independent of that it has no rights or property to be taken, that is, independently of the resolution of June 4, 1908, there was no appropriation or condemnation of the land. *Wagner v. Railway Co.*, 38 Ohio St. 32.

Having nothing independently of its charter and the resolution of June 4, 1908, it could be divested of nothing and it must rely upon the assertion of a contract and the impairment of it by the State or some agency of the State exercising the State's legislative power. That there is such agency is the contention, but what it is exactly it is not easy to say. We, however, pick out of the confusion of the bill, with the assistance of plaintiff's brief, that the rights

it acquired, and by what they are impaired, are as follows: By the resolution of June 4, 1908, the lands described in the bill (Exhibit A) became, and ever since have been, subjected to plaintiff's public use and subject to its rights of way and franchises exclusive of all other persons or corporations, that the Traction Company asserts and claims that by reason of purchases of the rights and franchises of The Northern Ohio Power Company sanctioned by the orders of the Public Utilities Commission as set forth in the bill, and the construction by the Traction Company of power plants upon the designated tracts of land, they, the tracts of land, have become subject to a public use and cannot be appropriated by plaintiff. And it is said (in the brief) that the Traction Company bases its claim upon the state laws, that is, the incorporation of the defendant Power Company and the Public Utilities Commission's orders.

It is manifest that there was no state legislative or other action against any charter rights which plaintiff possessed. What the Traction Company may, or does claim, cannot be attributed to the State (its incorporation antedated that of plaintiff), and it would be a waste of words to do more than say that the incorporation of plaintiff under the general laws of the State did not preclude the incorporation of the Power Company under the same general laws. What rights, if any, the Power Company thereby acquired against plaintiff is another question. There remains then, only the order of the Public Utilities Commission, authorizing the conveyance by the Power Company of the latter's rights and franchises to the Traction Company, to complain of as an impairment of plaintiff's asserted contract. But here again we are not disposed to engage in much discussion. The Commission's order may or may not have been the necessary condition to a conveyance by the Power Company of whatever rights it had to the Traction Company. (§ 614-60, Page and Adams Ohio General

Code.) The order conferred no new rights upon the Power Company which that company could or did convey to the Traction Company, nor give them a sanction that they did not have, nor did it affect any rights of the plaintiff.

From every federal constitutional standpoint, therefore, the contentions of plaintiff are so obviously without merit as to be colorless and whatever controversies or causes of action it had were against the defendant companies as rivals in eminent domain, or as owners of the lands, and, diversity of citizenship not existing, the District Court of the United States had no jurisdiction.

Decree affirmed.

MR. JUSTICE DAY and MR. JUSTICE CLARKE took no part in the consideration or decision of this case.